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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 962

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,
Appellants,
vs.
JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

THEODORE SACHS,
3610 Cadillac Tower,
Detroit, Michigan 48226,
Attorney for Appellants.

[illegible] Printing Co., 116 Congress St. E., Detroit 26, Michigan

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JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

This is an appeal by William C. Marshall, et al., from a judgment entered on March 16, 1964 by the District Court of the United States for the Eastern District of Michigan, Southern Division, by a three-judge statutory court specially convened under the provisions of 28 U.S.C. §2281.

This Statement is submitted by appellants to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The majority opinions of the District Court are unreported at this date and are appended to this jurisdictional statement as Appendix A, at p. 1a. The dissenting opinion of District Judge Roth is appended to this statement as Appeendix B, at p. 23a.

The Judgment of the District Court is appended as Appendix C, at p. 37a.

JURISDICTION

This suit was instituted by appellants under 42 U.S.C. §1983, *et seq.*; 28 U.S.C. §1343; 28 U.S.C. §§2281 and 2284; and 28 U.S.C. §2201, seeking a declaratory judgment and injunctive relief restraining the enforcement, operation and application of Art. IV, §§2-6 of the Michigan Constitution of 1963, appellants being denied full and equal voting rights in the election of members of the Michigan legislature thereunder, as secured by the provisions of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Notice of Appeal to this Court was filed on March 20, 1964.

The jurisdiction of this Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253.

The following decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case:

Baker v. Carr, 369 U.S. 186; *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962), 229 Md. 406, 184 A. 2d 715, Docket No. 29, this Term, *prob. juris.* noted, 374 U.S. 804; *Davis v. Mann*, 213 F. Supp. 577 (E.D., Va. 1962), Docket No. 69, this Term, *prob. juris.* noted, 374 U.S. 803; *Sims v. Frink*, 208 F. Supp. 431 (M.D., Ala., 1962), *sub noms., Reynolds v. Sims, Vann v. Frink, McConnell v. Frink*, Docket Nos. 23, 27, 41, *prob. juris. noted*, 374 U.S. 802; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D., N.Y., 1962), Docket No. 20, this Term, *prob. juris.* noted, 374 U.S. 402; *Sincock v. Duffy*, 215 F. Supp. 169, *sub nom. Roman v. Sincock*, Docket No. 307, this Term, *prob. juris.* noted; *Lisco v. Love*, 219 F. Supp. 922, *sub nom. Lucas v. Forty-fourth General Assembly of Colorado*, Docket No. 508, this Term., *prob. juris.* noted; *Nixon v. Herndon*, 273 U.S. 536; *Smiley v. Holm*, 285 U.S. 355; *Turman v. Duckworth*, 329 U.S. 675; *U. S. v. Classic*, 313 U.S. 299; *U.S. v. Saylor*, 322 U.S. 385.

STATUTES INVOLVED

Art IV, Secs. 2-6, inclusive, of the 1963 Michigan Constitution is set forth in Appendix D, *infra*, at p. 38a.

42 U.S.C. §§1983 and 1988, and 28 U.S.C. §1343 (3), are set forth in Appendix E, *infra*, at p. 43a.

The United States Constitution, Amendment XIV, Sec. 1, is set forth in Appendix F, *infra*, at p. 44a.

QUESTION PRESENTED

Do Michigan's 1963 constitutional provisions, which *inter alia* base Senate representation on "land area" and in substantial and disparate degree, and "insofar as possible" maintain districts heretofore adjudged unconstitutional as arbitrary and capricious, and which provide for an apportionment agency itself selected geographically, and which thereby and otherwise disfavor metropolitan residents, creating district population disparities exceeding 4-1; and which grant House representation to each county or group of counties having 77% of ratio, following county lines, and with 2-1 disparities; violate the equal protection clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellants, as citizens of the United States and the State of Michigan, and as qualified and registered electors of each, brought suit in behalf of themselves and others to declare invalid and enjoin the implementation of the provisions of the Michigan Constitution of 1963, Art. IV, Secs. 2-6, inclusive, pertaining to legislative apportionment.

The Attorney General of Michigan, appearing for the Secretary of State, concurred in Appellants' position and prayer. The remaining Appellees intervened in opposition.

The provisions were adopted by a constitutional convention convened in 1961, pursuant to 1961 referendum authorization of the Michigan electorate, and composed in part of delegates from districts later declared unconsti-

tutional in *Scholle v. Hare*, 367 Mich. 176, 116 N.W. 2d 350 (1962), pet'n for cert. pending *sub nom., Beadle v. Scholle*, Docket No. 24.[1]

The constitution was adopted by a majority of the delegates on August 1, 1962, and thereafter approved by the Michigan electorate April 1, 1963. The margin of adoption was 7,424 out of a total vote of 1,614,296 or a vote plurality of .0046%, as determined by recount.

The revised constitution included within it the provisions here under attack. Essentially, the provisions for the 38-seat Senate—described as the "area"-based body—established a complex plan of according "factors" to each of the counties, based upon their relative percentages of area IN A LITERAL SENSE and population, with the counties as thus pre-weighted to be joined together in the formation of districts; existing districts were to be retained "insofar as possible." The provisions for the 110-seat House—described as the "population"-based chamber—established a plan guaranteeing representation to each county or group of counties having a minimum percentage of the state's population, though less than "ratio", specifically, 7/10ths of 1%,[2] with remaining seats to be distributed under a mathematical system designated as the "method of equal proportions". Appellants challenged both houses as departing arbitrarily and substantially from a population standard and securing minority control in each.

The extraordinary provisions as to the Senate provide that to each county's percentage of the total state "land

[1] Delegates were selected, one each, from Senate and House districts then existing. Art. XVII, §4, Mich. Const., 1908, as amended.

[2] And therefore 77% of "ratio", which is .9091% for the 110 seat body (100% ÷ 110).

area"[3] there be *added (not multiplied)* 4 times its percentage of the state's population, with the aggregate percentages (then called "factors") to serve as the basis for joinder to other counties in the formation of districts. Complete details are set out in the margin.[4] While advertised by the delegates and the plan's proponents as an "80% population-20% area" formula, implying that representation was to be uniformly based in each senatorial district 80% on population and 20% on land area, in fact *no such representation is provided anywhere, except for the entire state in the aggregate* (there being 4 x 100%, or 400 population "factors," plus 1 x 100%, or 100 area "factors"). Rather, the formula necessarily creates grossly disparate representation in every county and therefore every district

[3] In fact, "land area" embraces water, under borrowed U.S. census definition: "*Land* was defined to include: Dry land and land temporarily or partially covered by water, such as marshland, swamps, and river flood plains; streams, sloughs, estuaries and canals less than one-eighth of a statute mile in width; *and lakes, reservoirs, and ponds having less than 40 acres of area.*" (Emphasis added.)

[4] 1. Each county's percentage of the total state population is determined and then rounded to 2 decimal places.

2. Each county's percentage of the total state land area is computed and rounded to 2 decimal places.

3. Four times the population percentage for each county is then added to one times the county's area percentage. (The percentages are called "factors", and because they will total 100% of the State's area and 400% of its population, there will be a total of 500%, or 500 factors, state-wide).

4. The counties are then divided into 2 groups: those having 13 or more apportionment factors and those having less than 13 factors. (The number 13 is apparently selected because it represents the nearest whole number to the average number of factors for all districts—i.e., 500 factors divided by 38 seats equals 13, rounded).

5. The percentage of the total apportionment factors possessed by each class of counties is then multiplied by the number of total seats, i.e., 38, in order to determine the percentage of the whole Senate to which each class is entitled. The resulting product is then rounded to the

(Continued on next page)

in the state, with populous, densely settled areas being consistently disadvantaged, and sparsely settled, rural areas being consistently favored. This follows because the populous areas derive relatively no representation from their area, while rural areas tend to draw most of their representation from that source. (See Appendix G, 45a, and

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(Continued from preceding page)

nearest whole number. (Thus, in 1960, the 5 "Class 1" counties, namely, those having at least 13 factors each Wayne (Detroit), Oakland (metropolitan Detroit), Macomb (metropolitan Detroit), Genesee (Flint), and Kent (Grand Rapids), with an aggregate population of 57.52%, will receive by virtue of their 236.16 total factors, 47.23% of the 38 seats in the Senate, or 17.95, which, rounded off, gives 18. The remaining counties, i.e., the "Class 2" counties, will receive the remaining 20 seats.

6. Within the "Class 1" counties, i.e., the more populous ones, having 13 or more factors each, one seat is allocated to each of such counties and then by the mathematical method of equal proportions the remaining seats are distributed on a basis of relative priority.

7. Within each metropolitan county entitled to more than 1 Senate seat, single member districts are to be constructed with regard to incorporated city or township boundary lines as far as possible. The population of such districts within a single county must be as nearly equal as possible, but may not be less than 75 percent nor more than 125 percent of the average district population of the county.

8. Within the Class 2 group of counties, i.e., those having less than 13 factors each, existing districts are to be retained "insofar as possible", except as necessary to comply with "the above standards", which counties are to be combined to form single member districts having not less than 10 nor more than 16 factors, being "compact, convenient, and contiguous by land, as rectangular in shape as possible," and having as nearly as possible 13 apportionment factors.

To summarize, two classes of districts are established, one the more populous counties having each at least a ratio of factors *(not a ratio of population)* and two, all others. The populous or urban counties, i.e., the "Class 1" counties, then receive in the aggregate the percentage of Senate seats which their aggregate percentage of total state factors, *not population*, entitles them, with intra-class distribution subsequently occurring by the method of equal proportions. On the other hand, the "Class 2", or rural counties, having received their aggregate allotment, receive a distribution of seats, then, with the permissible spread of 10 to 16 factors, with existing districts not to be disturbed unless they fail to comply with such standards.

demonstration in the margin.)[5] Disparities range from the extreme of 88.8% *area*-11.2% population in Keweenaw County to 0.8% area and 99.2% population in heavily populated Wayne County (Detroit).[6] District combinations blunt such county disparities only partially, leaving as much as two thirds of district weight derived from area.[7] What the plan actually does is pre-weight people relative to their adjacent space, "creating" or "extinguishing" "artificial people" before the adjusted, artificial populations are then aggregated or divided to form legislative districts. Thus, each of the 500 factors (whether drawn from space

[5] For example:

	POPULATION			AREA			
ounty	1960 Pop.	% of Mich. Pop.	Pop. Factors (4 × % of Pop.)	Square Miles	Acres	Area Factors (1 × % of Area)	Total Factors
veenaw ..	2,417	.03	.12	544	348,160	.95	1.07
yne	2,666,739	34.08	136.32	607	388,480	1.06	137.38

	% of Factors Based on Pop.	% of Factors Based on Area	Index of Rep'n (Ratio = 100.)	Senators per 100,000 Persons	Relative Rep'n (Wayne = 1.00)
veenaw	11.2	88.8	693.	3.36	8.62
yne	99.2	.8	81.	.39	1.00

How few of the metropolitan "factors" come from "area" is further realized when it is seen that the 5 "Class 1" counties with 236.16 total factors derive all but 6.08 of them from their population or only 2.6% of total factors from "area."

[6] See previous note.

[7] For example, an analysis of intervening senators' Map II B-2 exhibit "Senate—as close as possible to 13 factors", relied upon by intervenor appellees and Judge Kaess as the embodiment of the fairest expression of the "80-20" formula, would produce these disparate results:

District No.	Counties	Pop. Factors	Area Factors	Total Factors	% of Rep'n. from Pop.	% of Rep'n. from Area
1	Wayne	136.32	1.06	137.38	99.2	.8
24	Alger Baraga Houghton Keweenaw Marquette	5.68	9.18	14.86	38.2	61.8

or people) is equivalent to 15,648 persons (Michigan's population of 7,823,999 divided by 500), so that the people in each county receive an artificial weight relative to their surrounding space.[8] Bizarre consequences predictably ensue, for as the chief apologist for the plan admitted:

> "Unfortunately, this precision and certainty is achieved by introducing into the apportionment formula the concept of direct representation of land area. It is literally true, as critics of the plan have pointed out, that 19.05 acres of land are given precisely the same weight in calculating the apportionment factors as 1 person. As population increases and land area remains constant, the acres per person equation will find a smaller number of acres required to equal one inhabitant." John P. White, "Apportionment and Representative Institutions, the Michigan Experience" (Institute of Social Science Research, 1963), at p. 338.

In specific application, the predictable, current consequences of the plan are undisputed.

The "Class 1" (or metropolitan counties) under the plan,[9] with an aggregate population of approximately 4.5 million or 57.5% of the state's population, will have only 18 senators out of 38, or approximately 47% of the Senate, since they receive in the aggregate only 47.2% of the state's total "factors". On the other hand, the remaining residents of the state, some 3.3 million persons, or nearly 1.2 million

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[8] For example:

County	Actual Pop. 1960	Total Factors of County	"Artificial People" (Factors × 15,648)	Difference	% of Difference	Index of Rep.
Wayne	2,666,739	137.28	2,149,722	—517,017	—19.39	81.
Keweenaw	2,417	1.07	16,743	+14,326	+592.72	693.

[9] For 1960, Wayne, Oakland, Macomb, Genesee and Kent, each alone having at least 15 "factors". Art. IV, Sec. 2(1).

less, will elect two more senators, or a total of 20, for 53% of the Senate since they receive (by difference) 52.8% of the aggregate "factors".

The 10% aggregate loss of seats in the metropolitan areas means specifically a 4-seat loss to those counties, and a consequent 4-seat gain to less populous, rural areas. (The net eight seat shift out of 38 results precisely from the aggregate 20% area factor of the "80%, 20%" formula). Wayne County (Detroit) gets 10 seats instead of the 13 to which its 34.08% of state population entitles it, or 26.32% of the Senate seats, while Kent gets 1 seat (2.63% of Senate) instead of the 4.64% to which it is entitled.

Not only will the metropolitan counties receive in the aggregate approximately 10% less representation in the Senate than that to which their population entitles them, and the rural areas 10% more, but predictable district populations will vary more than 4-1, and could vary as much as 8-1. Thus, the largest district will invariably be Kent County (363,187 persons), while the smallest district will contain as few as 45,105 persons, and no more than 97,360, under 1960 census figures.

Further, the minimum percent of the state population represented by a majority of members of the Senate will be approximately 40%, based on the 1960 census, and conceivably may decline in future years to a slightly lesser percent.

In the sparsely settled Upper Peninsula, the extraordinary consequence of this formula for literal area representation is that representation is accorded to sections of the state which are *either substantially or totally uninhabited*. Thus, because of its area component of 29.01 "factors", accounting for some 65% of its total representation, and based substantially upon huge, publicly owned state and

federal fish, forest and wildlife preserves, the Upper Peninsula will receive in perpetuity, *even without any inhabitants*, a minimum of two senators, but for practical purposes three (as before) as long as there is some minimal human habitation. Indeed, 30% of all Michigan "area" representation will come from public lands!

Appellants claimed that the "80-20" formula is defective in that: (1) it literally represents space—an inherently invidious, irrational and arbitrary concept; (2) it does so in grossly excessive degree—with population disparities of at least 4-1, and possibly up to 8-1; (3) it establishes in application disparate and varying ratios of population and area for each county and for each district of the state; (4) it accords more representation for space than for people in approximately one-half of the state's counties (with variations as high as 89% area, 11% people) (See Appendix G) and in a substantial number of districts; (5) it inherently will weight space more favorably relative to population as the state's population increases and its area, of course, remains constant; (6) it inherently allots different representation to the citizens of each county of multi-county senatorial districts, contrary to the minimal holding of *Gray v. Sanders*, 372 U.S. 368, which requires at least equal treatment of all voters in a single constituency;[10] (7) it requires the continued utilization "insofar as possible" of existing districts heretofore held violative of the Fourteenth Amendment as arbitrary and capricious, in *Schaller v. Hare*, 367 Mich. 176, app. for cert. pending this Term, No. 24; and (8) it does all of these things with the purpose and/or effect of disfavoring voters in more populous or urban

[10] While admittedly each voter in such districts casts a single ballot, that ballot has been pre-weighted through the pre-weighting of counties; that proposition is hardly distinguishable from the post-weighting of *Gray*.

counties as a class, both as far as the citizens in given metropolitan counties are concerned relative to outstate counties and insofar as citizens of metropolitan counties in the aggregate receive less representation than that to which their population would entitle them.

Appellants also attacked the House provisions because of the arbitrary departures from a population standard otherwise provided, including the guarantee of a full seat to a county with less than a ratio of population, specifically, 7/10ths of 1% in a 110 seat chamber, or 77% of ratio; the inflexible adherence to county lines except in multi-seat counties; and the authorized intra-city variations of 75-125% of ratio. In application, these provisions permit, *in the body allegedly based strictly on "population,"* a 2-1 disparity in district populations, a net 4-seat shift from the populous counties to the less populous ones *over and above the consequences of adherence to county lines*, and minority control of the House as well as the Senate.

Appellants further challenged the Legislative Apportionment Commission itself, the administrative agency established by Art. IV, §6, established *entirely* on an "area" basis, drawing eight members, 4 each from opposing political parties, from 4 arbitrarily designated quadrants of the state. In effect, 8% of the persons of Michigan are given representation on the Commission equivalent to the remaining 92%.

The Court below, by a 2-1 vote, denied appellants all relief. Although acknowledging that in the Senate "the ratio of the population of the most populous district to that of the least populous will probably exceed four to one", it found the disparity not excessive. It excused the literal representation formula on the basis of an assumed rational and permissible objective of "assurance of adequate repre-

sentation to a sparsely populated and impoverished region", namely, the Upper Peninsula and the northern part of the lower peninsula—although appellees made no such argument and there is nothing in the formula limiting its application to any particular region. It rationalized metropolitan voter shortcomings, by arguing that "urban" majorities—arbitrarily defined—will prevail. It excused House disparities as minimal and an appropriate concession to "persons living in sparsely populated areas"—although there is no density factor whatsoever in the House provisions, and the disparities alleged above were conceded. Finally, it justified everything on the basis that the voters had spoken.

Implicit in the majority opinions and in the constitutional provisions themselves is the assumption that *allegedly* substantial adherence to population in one house excuses gross departures from population in the other. Only thus can the preoccupation of the majority with justifying a supposed 4-out-of-110 seat population departure in the House,[11] while expressing virtual indifference to a five-times-greater, 8-out-of-38 (20%, rounded) departure in the Senate, be explained.

In an eloquent dissent, Judge Roth held the provisions of *both* Senate and House invalid. He ruled the Senate "area" concept of representation as bad *per se*, as unrelated to any valid legislative purpose or the interests of people; as contrary to traditional Michigan legislative apportionment provisions historically based on population; and as "arbitrary, capricious and constitutionally unjustified. There is here no 'practical equality' with 'rational deviations'". He deemed the House provisions equally bad—because of the ".7%," "75%-125%", and similar provisions.

[11] Which, however, is purposeful, arbitrary and avoidable.

Plaintiffs filed notice of appeal on March 20, 1964.

THE FEDERAL QUESTION IS SUBSTANTIAL

This case presents the very apotheosis—or *reductio ad absurdum*—of "area" representation. Heretofore "area" representation has been rhetoric; here it is reality. Where before, the "area" reference served as a figurative, conceptual catch-all for plans of representation other than population, here it is literal in design and application.

As such, the plan is unprecedented in the history of the United States. As written by one commentator before its adoption, "this provision if adopted will be the only state constitutional apportionment rule which frankly recognizes area in terms of square miles as a basis of apportionment. Other states undoubtedly recognize area but this recognition, which might be justified for other reasons, evolves from the fixing of districts in the constitution or the giving of minimal representation to each county."[12]

Nor are such provisions expressly before this Court in those cases heretofore argued or pending:

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[12] University of Michigan Law Professor William J. Pierce, "Apportionment and Representative Institutions, the Michigan Experience", (The Institute for Social Science Research, 1963) p. 97.

And, as Professor John P. White, an apologist for the plan, wrote:

"[T]he plan proposed for the senate is totally unlike the apportionment system used in any other state legislative body." *Op. cit.*, p. 264.

And,

"[W]hatever the final judgment of the people of the state as well as of the courts of law, the apportionment provisions of the new constitution were and are sharply different from the old constitution. The method of apportioning the senate is not only different from the old constitution, but different from the apportionment system used in any other state in the union." *Op. cit.*, p. 239.

> "There is not in any of the cases now before the Court such a bald attribution of weighting to area as in Michigan [although] in each of the cases the effect of the existing provisions is to favor land masses directly or indirectly, necessarily at the expense of the right of franchise of individual voters."[13]

Thus, the Michigan provisions are to be distinguished even from the arbitrary features of the Illinois Constitution before this Court in *Germano, et al. v. Kerner, et al.*, this Term, No. 636, in terms imposing an "area" standard and dividing Illinois into three arbitrary segments, with the random allocation of Senate districts to each.[14] Yet both the Illinois Supreme Court in *Donovan v. Holzman*,

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[13] Dean Robert B. McKay, N. Y. U. Law School, *Amicus* brief of the A. J. C., ACLU and NAACP in Nos. 20, 29, 23, 27, 41 and 69, this Term, *W. M. C. A., Inc., Maryland Committee, Reynolds, Vann, McConnell* and *Davis, et al.*

[14] Article IV, Section 6, as amended, of the Constitution of Illinois provides:

"§6. Senatorial districts—Redistricting—Number of senators—Terms.

"The General Assembly in 1955 shall redistrict the state for the purpose of electing state senators. There shall be fifty-eight senatorial districts. Cook county shall have twenty-four of the districts. These twenty-four districts shall be located as follows: Eighteen in the territory that is within the present limits of the city of Chicago; and six in the territory that is in Cook County outside such corporate limits. The remaining one hundred and one counties of the state shall have thirty-four of the senatorial districts.

"All senatorial districts shall be formed of contiguous and compact territory. *In their formation, area shall be the prime consideration.*

"The senatorial districts shall be numbered one, two, three, and so forth, including fifty-eight. Each such district shall elect one senator, whose term of office shall be four years. Senators elected in districts bearing even numbers shall be elected in 1956 and every four years thereafter; and senators elected in districts bearing odd numbers shall be elected in 1958 and every four years thereafter." (Emphasis added.)

8 Ill. 2d 87, 132 N.E. 2d 501 (1956), and the majority in *Germano*, 220 F. Supp. 230 (N.D. Ill., 1963), shrank from a literal construction of the "area" command of the Illinois constitution, a majority opinion in the latter holding it would be "legal folly to contend that the Amendment intended to equate representation in the senate in proportion to square miles. Such a view would have our system of government retrogressing to a ~~federal~~ feudal arrangement where land ownership was synonymous with political power."

Yet that is precisely what Michigan has done. And Nebraska—following Michigan's example—has since done the same.[15] The latter plan, establishing a variable 70%-80% "population," 30%-20% "area" formula, is before a three-judge federal panel in *League of Nebraska Municipalities, et al. v. Marsh, et al.*, U.S.D.C., D., Neb., Civil 551 L, which panel recently stayed its own hand (unreported

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[15] Art. III, §5, of the Constitution of Nebraska, as amended by voter initiative, now provides:

"Sec. 5. At the regular session of the Legislature held in the year nineteen hundred and thirty-five, the Legislature shall by law determine the number of members to be elected and divide the State into Legislative Districts. In the creation of such Districts, any County that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct Legislative Districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such Districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such District. The basis of apportionment shall be the population excluding aliens, as shown by next preceding Federal Census. The Legislature may redistrict the State from time to time, not more often than once in ten years. In any such redistricting, County lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature. *In such redistricting, primary emphasis shall be placed on population and not less than twenty per cent nor more than thirty percent weight shall be given to area.*" (Emphasis added.)

opinion, March 3, 1964), pending anticipated guidance from this Court in other cases.[16]

The beguiling superficial rationality of such a system, however "feudal" in tenor and fact, means that not only in Michigan, but nationally, will acres-people equations be generally adopted if the view of the Court below is ultimately validated. As stated by one writer:

> "Having been approved by the people of Michigan, it will—if it survives the inevitable judicial examination—almost certainly be considered by other states that wish to adopt a legally defensible method of granting special consideration to sparsely populated areas."[17]

For, just as in Michigan it was supposed by the draftsmen of the present plan—over-reacting to and miscomprehending the import of *Baker v. Carr* and *Scholle v. Hare*—that form and *formula* would suffice for substance, draftsmen elsewhere can similarly verbalize a people v. acres equation for virtually any malapportionment anywhere *which would otherwise fail under any Fourteenth Amendment tests of this Court.*

While proponents excuse the Michigan plan on the basis that that kind of people v. areas *result* can now be *deduced* elsewhere, surely that kind of invidious consequence as an *objective* can not be valid under the Fourteenth Amendment equal protection clause. Moreover, that a plan is intelligible —as this admittedly is—does not make it rational, even if its subordination of the population principle (diluting voter representation by more than 4-1, and up to 8-1) were

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[16] Earlier opinion appeared at 209 F. Supp. 189.

[17] Professor John P. White, "Apportionment and Representative Institutions, No. 69, The Michigan Experience," p. 235.

not gross. Nor can a reference to population "density" excuse invidious and disparate treatment of citizens; for to talk of population "density" or "sparsity" is but to speak of "the same [invidious] thing as giving more representation to rural than urban areas[,] as population density is much lower in the former than in the latter." *Amicus* brief of United States, p. 42 n. in *Davis v. Mann*, this Term. Further, "An apportionment based in whole or in part on area would also be invidious since legislators represent people, not land." *Id.* p. 43, n. 22. And unsupported —and unsupportable—rationalizations by the majority below for the deliberate grant of political power as an economic subsidy to allegedly "impoverished" and less "fertile" regions of the state, indeed with such regions being artificially and arbitrarily defined,[18] are even more indefensible.

Considering the number and breadth of cases in the area of legislative apportionment already before this Court, including those argued and or still pending,[19] and the conflicts and disparate views of the lower courts, already well

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[18] Judge Kaess lumps together for analysis the Upper Peninsula and northern Lower Peninsula, though intervenors argued as to the allegedly unique insularity of the Upper Peninsula alone as entitling it peculiarly to special consideration. And neither the majority nor intervenors explained, or offered to explain, *the rural advantages everywhere in the state.*

[19] *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962), 229 Md. 406, 184 A. 2d 715, Docket No. 29, this Term, *prob. juris.* noted, 374 U.S. 804; *Davis v. Mann*, 213 F. Supp. 577 (E.D., Va., 1962), Docket No. 69, this Term, *prob. juris.* noted, 374 U.S. 803; *Sims v. Frink*, 208 F. Supp. 431 (M.D., Ala., 1962), *sub nom., Reynolds v. Sims, Vann v. Frink, McConnell v. Frink*, Docket Nos. 23, 27, 41, *prob. juris.* noted, 374 U.S. 802; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D., N.Y., 1962, Docket No. 20, this Term, *prob. juris.* noted, 374 U.S. 402; *Sincock v. Duffy*, 215 F. Supp. 169, *sub nom., Roman v. Sincock*, Docket No. 307, this Term, *prob. juris.* noted; *Lisco v. Love* (Colo., 1963), 219 F. Supp. 922, *sub nom. Lucas v. Forty-fourth General Assembly of Colorado*, Docket No. 508, this Term, *prob. juris.* noted; *inter alia.*

known to this Court, it would be superfluous to argue at length to the Court the substantiality of the federal questions involved in this cause and others. But while each litigant may well argue to this Court the import of his own cause, surely it must be recognized that the consequences of the present provisions, if sustained, transcend all local borders, are nationwide in scope and import, and present a frightening spectre as to the future of the effective franchise in a democratic government in the field of legislative apportionment. FOR IF THESE PROVISIONS STAND, ANY CAN—if imaginatively verbalized.

That the provisions below were adopted by voter initiative as part of a total state constitution will not alter the consequences, the majority below to the contrary notwithstanding. Surely, as has been repeatedly and correctly held by and argued to this Court, constitutional rights can not be dependent upon majority vote.[20] Surely this is so in the present instance where the margin of success was infinitesimal; the election pertained to the adoption of an *entire* constitution, rather than to specific apportionment provisions; those apportionment provisions were extraordinarily complex; and the proponents of the new constitution urged voters to adopt the constitution *notwithstanding the apportionment provisions, which voters were told would be the subject of independent judicial review.*[21] Having success-

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[20] *West Virginia State Board of Education v. Barnett*, 319 U.S. 624 (1942) at p. 638; *Thigpen v. Meyers*, 211 F. Supp. 826, pending on appeal, this Term No. 381; *Scholle v. Hare, supra.*

[21] Said then Governor-elect Romney, as reported in the Lansing State Journal, December 18, 1962:

"Romney commented to newsmen that he did not regard the legislative apportionment provisions of the new constitution as a key factor on which to decide its fate at the polls. The reason, he said is that the United States Supreme Court has really taken that question out of our hands.'

(Continued on next page)

fully urged to voters the withdrawal of apportionment issues as a judicial question, the proponents reversed field and urged to the courts that the voters' action was a binding political one. Surely the Court below erred in agreeing. *West Virginia v. Barnett, supra; Scholle v. Hare, supra; Thigpen v. Meyers, supra; et al.* Nor can the illusory availability of an initiative afford an adequate remedy for protection of what is, after all, an individual voter's right. *Cf. League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (3-judge panel); *Scholle v. Hare, supra.*

This case presents in stark dimensions of national consequence whether a "gimmick" whose purpose is evident to all will be called for what it is.[22] In final analysis, though dressed up in pseudo-scientific, sophisticated garb, the present provisions have in common what all apportionment provisions not based substantially on population customarily do, namely, an attempt by some verbal rationalization to preserve the status quo. Recoiling from the now acknowledged[23] caprice of the districts condemned in *Scholle*, the

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(Continued from preceding page)

> 'Whatever it (the Supreme Court) decides on apportionment is what Michigan is going to do, regardless of what the new or the old constitution says,' he said. 'So the citizens of this state should not permit that question to determine their attitude on the new constitution.'"

[22] For an account of the political history and setting of the constitutional convention, see Jewell, "The Politics of Reapportionment" (Atherton Press, 1962), Chapter 15 (Prof. Karl A. Lamb); and Lamb, "Apportionment and Representative Institutions" (The Institute for Social Science Research, 1963), pp. 151-226.

[23] In this very case at trial, counsel for the Intervening Senators (the same intervenors as in *Scholle*) finally conceded the basis for decision, and the correctness of *Scholle*—as we have previously argued to this Court, in No. 24:

> "And, as Mr. Sachs said yesterday, the Michigan Supreme Court invalidated the constitution in *Scholle* because it was a crazy quilt."

new provisions' proponents sought to infuse the *appearance* of rationality, if not its substance, and to retain "insofar as possible" that which was previously held—and known to be—vulnerable. If *Baker v. Carr* condones such provisions, then it will be a dead letter before it ever gets really applied.

CONCLUSION

We respectfully and urgently urge this Court to accept appeal herein for plenary review and to reverse decision below.

Such action is essential to the nation as a whole.

Respectfully submitted,

THEODORE SACHS,
Attorney for Appellants,
3610 Cadillac Tower,
Detroit, Michigan 48226.

Dated: March 27, 1964.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, et al., *Plaintiffs,* v. JAMES M. HARE, Secretary of State, of the State of Michigan, *Defendant,* and FRANK D. BEADLE, et al. *Intervenors.*	Civil No. 24013

OPINION

KAESS, District Judge.

On June 20, 1963, the Board of State Canvassers certified that the vote on the Constitution proposed by the Michigan Constitutional Convention was 810,860 to 803,436 in favor of adoption. On June 21, 1963 this suit was brought to declare the provisions relating to the apportionment of the legislature, Mich. Const., 1963, Art. IV, §§2-6, invalid under the Fourteenth Amendment. The plaintiffs are Michigan citizens and qualified electors residing in Wayne County, Oakland County, and Muskegon County. The allegations of the complaint are that the provisions of the Michigan Constitution are irrational, are invidiously and

purposefully discriminatory, and grossly impair the right to vote of the plaintiffs and other Michigan citizens similarly situated.

The plaintiffs have urged the invalidity of any plan of apportionment adopted in accordance with the provisions of the Michigan Constitution. The defendant, the Michigan Secretary of State, has joined in the presentation of the plaintiffs' case, and left the defense of the Michigan Constitution to the intervening Senators and Chief Assistant Attorney General. The defendant has suggested, however, that it would be premature to consider the constitutional questions presented until a definite plan of apportionment has been adopted.

Various plans proposed by members of the Commission on Legislative Apportionment have already been submitted to the Supreme Court of Michigan. The responsibility of determining which plan complies most accurately with the requirements of the Michigan Constitution now rests with that Court. Mich. Const., 1963, Art. IV, §6. While constitutional questions must be considered on the basis of specific facts and not abstractly, it is of grave concern to us that the processes of state government may be interrupted through prolonged litigation. No plan of apportionment has been adopted, yet the tendency of the provisions of the Michigan Constitution can be foretold, and the degree of departure from the principle of equal population accurately predicted.

In accordance with the decision in *Baker v. Carr*, 369 U.S. 186, we hold that we have jurisdiction of the subject matter of the constitutional claim asserted in the complaint, that the plaintiffs have standing, and that we are not to be deterred from granting appropriate relief by the argument that the claim presents a political question.

The Michigan Constitution provides for a House of Representatives apportioned on the basis of population, subject only to the qualifications that county lines are to be followed in the creation of districts and that counties having a population of not less than 0.7% of the popula-

tion of the state are to be accorded separate representation. By statistical tests it may be shown that the districting set forth in the Senators' Map H A-2 embodies the principle of equal population most faithfully while adhering to county lines. Three classes have been established in our analysis—the five most populous counties, the remaining counties of the southern part of the Lower Peninsula, and the counties of the Upper Peninsula and the northern part of the Lower Peninsula.

Wayne County, at the center of the Detroit metropolitan area, stands apart. It has 34.08% of the population of the state, nearly four times the population of the next most populous county. Together the five most populous counties have 57.52% of the population of the state, the remaining counties of the southern part of the Lower Peninsula 33.58%, and the counties of the Upper Peninsula and the northern part of the Lower Peninsula 8.90%. Muskegon, Kent, Montcalm, Isabella, Midland, and Bay Counties have been selected to form a line dividing the Lower Peninsula. To the north of the line, the density of population falls sharply and there are distinct changes in climate and fertility of the soil and in the activities and income of the people.[1]

By reference to Table I it may be seen that the effect in districts created in the five most populous counties would be minimal. The effect would be appreciable only in districts created in less populous areas. In the district for Ottawa County (No. 19, Senators' Map H A-2) and the district for Shiawassee and Livingston Counties (No. 22, Senators' Map H A-2), the degree of under-representation, expressed as a percentage of the ratio of representation, would be 38.8% and 28.9% respectively. The degree of over-representation would be an average of 28.9% for the districts created in Monroe County (No. 30, Senators'

[1] Districts lying on the line have been counted as districts in the northern part of the Lower Peninsula only if a majority of the population lives to the north of the line.

Map II A-2), 32.0% for the district for Van Buren County, and 18.8% for the district for Allegan County (No. 25, Senators' Map II A-2). The ratio of the population of the most populous district to that of the least populous will exceed two to one, since the ratio of the population of Ottawa County, 98,719, to that of Van Buren County, 48,395, will exceed two to one.

It is a matter of general knowledge that county lines continue to have significance for persons who live in less populous areas. The county seat will be a focal point of political organization, and will often be the market place and the social and economic center of the surrounding countryside. There the county remains a natural unit of apportionment. In the great metropolitan areas, the county may assume greater importance than it has ever had as cities are transcended. The model for local government in the future may be the City and County of Los Angeles.

Authority to depart from the county line could create significantly more complex issues in districting. Not only could heretofore unrelated townships, villages or cities be combined, but they could be combined, for this one purpose, in a manner that cut across existing relationships in the manifold matters of local government. Of particular significance, authority to depart from county lines could lead to a patchwork or an impasse in the Commission on Legislative Apportionment. Thus there are strong arguments in favor of the county line.

The 0.7% provision permits a slight increase in the representation of persons living in sparsely populated areas. It is argued, on the one hand, that the provision is a grant of authority to the Commission on Legislative Apportionment to be exercised in its discretion, and, on the other, that it must be given full effect. Whether the provision must be given full effect is a matter of state law, to be determined by the Supreme Court of Michigan. In any event, it represents a minor departure from the principle of equal population. In Tennessee, the standard for the apportionment of the House of Representatives is

the number of qualified *voters* (as opposed to population), subject to the qualification that any county having two-thirds of the ratio of representation is entitled to one member. Tenn. Const. Art. II, §5. The Supreme Court found such a qualification minor in *Baker v. Carr, supra.* In Michigan, only counties having not less than seventy-seven hundredths of the ratio of representation[2] could be assured separate representation.

The effect of the provision would be appreciable, not in the most populous counties, but in the sparsely populated counties and the counties of intermediate population. At most, the representation of persons living in the Upper Peninsula and the northern part of the Lower Peninsula would be increased by two seats. The possible increase in representation would be made through a shift of one seat from Monroe County and one seat from Oakland County. Table II gives a general view of the departure inherent in following county lines and giving full effect to the 0.7% provision. By reference to Table III it may be seen that the most populous counties would still enjoy representation in the House very nearly in proportion to their population, even with a shift of two seats.

If the 80%, 20% formula is considered objectively, it will be found that it is equivalent to a formula in which greater weight is attached to population figures for sparsely populated areas, and that its effect is to increase the representation of persons living in the Upper Peninsula and the northern part of the Lower Peninsula. The mathematical precision of the formula adopted by the Constitutional Convention may be explained as a reaction to the decision reached by the Supreme Court of Michigan in *Scholle v. Secretary of State*, 367 Mich. 176, petition for certiorari pending before the United States Supreme Court. However, the formula is more than a recasting of the balance

[2] The Michigan House of Representatives has 110 members, making the ratio of representation 0.9091% of the population, and 0.7% of the population is approximately seventy-seven hundredths of the latter.

that existed between urban and rural areas. It represents a profound change, as it gives urban areas a clear preponderance.

DISTRIBUTION OF SEATS IN THE SENATE[3]

	Urban	Rural	Total
Under 1952 Amendment..	16	18	34
Under new Constitution..	22 or 23	15 or 16	38

Most of the additional seats for urban areas will go to the five most populous counties. Wayne County will gain three, Oakland County two, Macomb County one, and Genesee County one. Kent County will lose a seat. Together, the five most populous counties will have 18 seats, while under the 1952 Amendment they had 12.

The representatives of the four most populous counties of the state will not constitute a majority of the Senate, but the representatives of the six most populous counties will. Population and representation are compared for the Senate in Table IV. In the remaining tables, the degree of departure from the principle of equal population under three possible applications of the 80%, 20% formula is presented. The degree of under representation will be 76.39% in the district for Kent County and the average degree of under-representation will be 29.52% in the ten districts created in Wayne County. Thus the ratio of the population of the most populous district to that of the least populous will probably exceed four to one.

The people of northern Michigan are placed at an economic disadvantage due to the depletion of their natural resources and the decline of some of their industries. They are far from the seat of government, far from the great

[3] We have employed the figures for "urbanized areas" in the 1960 Census in determining the number of districts that are urban in character. The plaintiffs have not suggested any alternative figures, and apparently do not consider the balance between urban and rural areas material.

concentrations of wealth and power. The difficult problems they face often are not those faced in other areas of the state.

The Upper Peninsula and the northern part of the Lower Peninsula are separate areas economically. While they are connected by a great bridge at the Straits of Mackinac, daily travel from one area to the other is not always practicable. If the principle of equal population were applied strictly, as advocated by the plaintiffs, they would have three senators to represent them in a Senate of thirty-eight. They would have nine representatives in a House of one hundred and ten. The new Constitution will increase their representation in the Senate, possibly to seven. If full effect were given to the 0.7% provision, the new Constitution would increase their representation in the House to eleven. We find entirely reasonable the belief that such an increase is necessary to assure the people of Northern Michigan an adequate voice in the legislature. Without some weighting, their interests could be ignored completely.

In our consideration of the constitutional questions, we have been guided by the analysis made by the Solicitor General of the United States in the apportionment cases argued before the Supreme Court. The three tests advanced by the Solicitor General have been adopted: (1) whether the basis for departure from the principle of equal population can be discerned, (2) whether it represents a legitimate objective in legislative apportionment, and (3) whether the principle of equal representation is subordinated to an excessive degree.

There is agreement that the first test has been met. The basis for departure from the principle of equal population can be discerned. It is not unintelligible. It was debated in the Michigan Constitutional Convention, and was known to the people when they voted in April 1963. The substantial departure in the Senate and the possibility of a slight departure in the House result from a determination deliberately made to increase the representation of the people of Northern Michigan.

The second and third tests are also met. The assurance of adequate representation to a sparsely populated and impoverished region constitutes a proper objective, and the provisions of the new Constitution do not subordinate the principle of equal population to an excessive degree. The processes of state government, we believe, prove reponsive to the needs and interests of all areas of the state.[4] The propriety of the apportionment provisions was a matter within the legislative judgment of the people of Michigan.

It has been argued that the provisions of the new Constitution permit a tyranny by the minority. In April 1963, the vote was in favor of the adoption of the Constitution. *In November 1952, the vote was against the system of apportionment now advocated by the plaintiffs.* The plaintiffs and others who share their political philosophy have demonstrated that they possess the financial resources and the experience in political action necessary to place the matter before the people at any time. The amendment of the Constitution by petition is a vital institution in Michigan and has been resorted to on numerous occasions. In addition, the matter of general constitutional revision must be placed before the people every sixteen years. Mich. Const., 1963, Art. XII, §3. If, in the name of majority rule, we were to hold the provisions of the new Constitution invalid, after their recent adoption by a majority of the people voting on the question, and while they were subject to the processes of amendment, we would be substituting for democratic institutions, a tyranny by the judiciary.

We hold the provisions of the new Constitution neither invidious nor irrational, but (bearing in mind the almost insolvable problems of theory, the contrary opinions of political and legal commentators, and the confusion of judicial authority, both state and federal) a most remarkable result, openly and fairly reached, with ample facility for correction if need therefor arises.

The action should be dismissed.

Fred W. Kaess,
United States District Judge.

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[4] See Comment, *Baker v. Carr and Legislative Apportionments—A Problem of Standards*, 72 Yale L.J. 968, 1002-1006.

TABLE I

HOUSE OF REPRESENTATIVES—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	40.1%-45.0%			
	35.1%-40.0%		1	
	30.1%-35.0%			
	25.1%-30.0%		1	
	20.1%-25.0%		2	1
	15.1%-20.0%		2	
	10.1%-15.0%		3	
	5.1%-10.0%	5	6	
	0.1%- 5.0%	42	2	3
Degree of Over Representation (Negative Deviation)	0.1%- 5.0%	16	7	4
	5.1%-10.0%		2	1
	10.1%-15.0%		4	
	15.1%-20.0%		1	
	20.1%-25.0%		4	
	25.1%-30.0%		2	
	30.1%-35.0%		1	
	35.1%-40.0%			
	40.1%-45.0%			
		63	38	9

Note; Based on Senators' Map II A-2. Two districts on the line—the district for Osceola, Mecosta, and Montcalm Counties (No. 16, Senators' Map II A-2) and the district for Gladwin and Midland Counties (No. 10, Senators' Map II A-2)—are counted as districts in the southern part of the Lower Peninsula.

TABLE II

HOUSE OF REPRESENTATIVES—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES AND GIVING 0.7% PROVISION FULL EFFECT

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	40.1%-45.0%		1	
	35.1%-40.0%		1	
	30.1%-35.0%			
	25.1%-30.1%		1	
	20.1%-25.0%		2	
	15.1%-20.0%		2	
	10.1%-15.0%		3	
	5.1%-10.0%	14	6	
	0.1%- 5.0%	42	2	
Degree of Over Representation (Negative Deviation)	0.1%- 5.0%	6	6	1
	5.1%-10.0%		2	2
	10.1%-15.0%		4	2
	15.1%-20.0%		1	2
	20.1%-25.0%		5	4
	25.1%-30.0%			
	30.1%-35.0%		1	
	35.1%-40.0%			
	40.1%-45.0%			
		62	37	11

Note: Based on Senators' Map II A-3. Two districts on the line—the district for Mecosta and Isabella Counties (No. 17 Senators' Map II A-3) and the district for Gladwin and Midland Counties (No. 19 Senators' Map II A-3)—are counted as districts in the southern part of the Lower Peninsula.

TABLE III

HOUSE OF REPRESENTATIVES—COMPARISON OF POPULATION AND REPRESENTATION FOR THE MOST POPULOUS COUNTIES

	Seats	Percentage of Population	Percentage of Seats in House Giving 0.7% Provision Full Effect
Wayne County	37	34.08	33.64
Oakland County ...	9	8.83	8.18
Macomb County ...	6	5.19	5.45
Genesee County	5	4.78	4.55
Kent County	5	4.64	4.55
Ingham County	3	2.70	2.73
Four Most Populous Counties	57	52.88	51.82
Five Most Populous Counties	62	57.52	56.36
Six Most Populous Counties	65	59.96	60.22
Ten Most Populous Counties	74	68.95	67.27

TABLE IV

SENATE—COMPARISON OF POPULATION AND REPRESENTATION FOR THE MOST POPULOUS COUNTIES

	Seats	Percentage of Population	Percentage of Seats in Senate
Wayne County	10	34.08	26.32
Oakland County ...	3	8.83	7.89
Macomb County ...	2	5.19	5.26
Genesee County ..	2	4.78	5.26
Kent County	1	4.64	2.63
Ingham County[a] ..	1	2.70	2.63
Four Most Populous Counties	17	52.88	44.74
Five Most Populous Counties	18	57.52	47.37
Six Most Populous Counties[a]	19	60.22	50.00

(a) It is assumed that Ingham County has been given separate representation. See Senators' Maps II B-2, II B-3, II B-4, and II B-5. Ingham County might be joined with Clinton County. See Map II B-6. The population figures would then be slightly greater.

TABLE V

SENATE—STRAIGHT POPULATION APPORTIONMENT—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED THROUGH ADHERENCE TO COUNTY LINES

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%			
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%			
	10.1%-20.0%	3		
	0.1%-10.0%		8	3
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	17	4	
	10.1%-20.0%	2	1	
	20.1%-30.0%			
	30.1%-40.0%			
	40.1%-50.0%			
	50.1%-60.0%			
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		22	13	3

Note: Based on Senators' Map II B-1. Two districts on the line—the district for Oceana, Newaygo, Mecosta, and Muskegon Counties (No. 18, Senators' Map II B-1) and the district for Arenac, Bay, Midland, and Tuscola Counties (No. 14, Senators' Map II B-1)—are counted as districts in the Southern part of the Lower Peninsula.

TABLE VI

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING AS NEARLY AS POSSIBLE 13 APPORTIONMENT FACTORS

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%	1		
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%	10		
	10.1%-20.0%	3	1	
	0.1%-10.0%		5	
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	4	3	
	10.1%-20.0%		4	
	20.1%-30.0%			
	30.1%-40.0%		1	
	40.1%-50.0%			2
	50.1%-60.0%			4
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		18	14	6

Note: Based on Senators' Map II B-2. Two districts on the line—the district for Oceona, Newaygo, and Muskegon Counties (No. 19 Senators' Map II B-2) and the district for Osceola, Clare, Gladwin, Mecosta, Isabella, and Midland Counties (No. 18, Senators' Map II B-2)—are counted as districts in the Southern part of the Lower Peninsula.

TABLE VII

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICIPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING NOT LESS THAN 10 NOR MORE THAN 16 APPORTIONMENT FACTORS—MINIMUM DISPARITY

	Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)	80.1%-90.0%			
	70.1%-80.0%	1		
	60.1%-70.0%			
	50.1%-60.0%			
	40.1%-50.0%			
	30.1%-40.0%			
	20.1%-30.0%	10		
	10.1%-20.0%	3		
	0.1%-10.0%		3	
Degree of Over Representation (Negative Deviation)	0.1%-10.0%	4	4	
	10.1%-20.0%		7	
	20.1%-30.0%		1	
	30.1%-40.0%			1
	40.1%-50.0%			2
	50.1%-60.0%			2
	60.1%-70.0%			
	70.1%-80.0%			
	80.1%-90.0%			
		18	15	5

Note: Based on Senators' Map II B-4. Three districts on the line—the district for Benzie, Manistee, Mason, Oceana, and Muskegon Counties (No. 6, Senators' Map II B-2), the district for Osceola, Clare, Gladwin, Newaygo, Mecosta, Isabella, and Midland Counties (No. 7, Senators' Map II B-2), and the district for Arenac, Bay, Tuscola, and Huron Counties (No. 8, Senators' Map II B-2)—are counted as districts in the southern part of the Lower Peninsula.

TABLE VIII

SENATE—DEPARTURE FROM PRINCIPLE OF EQUAL POPULATION THAT MIGHT BE ANTICPATED IF 78 COUNTIES HAVING LESS THAN 13 FACTORS ARE ARRANGED INTO DISTRICTS HAVING NOT LESS THAN 10 NOR MORE THAN 16 APPORTIONMENT FACTORS—MAXIMUM DISPARITY

Deviation from Ratio of Representation	Districts in Five Most Populous Counties	Remaining Districts in Southern Part of Lower Peninsula	Districts in Upper Peninsula and Northern Part of Lower Peninsula
Degree of Under Representation (Positive Deviation)			
80.1%-90.0%			
70.1%-80.0%	1		
60.1%-70.0%			
50.1%-60.0%			
40.1%-50.0%			
30.1%-40.0%			
20.1%-30.0%	10	2	
10.1%-20.0%	3	3	
0.1%-10.0%		4	
Degree of Over Representation (Negative Deviation)			
0.1%-10.0%	4		
10.1%-20.0%		3	
20.1%-30.0%		1	
30.1%-40.0%			1
40.1%-50.0%			
50.1%-60.0%			2
60.1%-70.0%			3
70.1%-80.0%			4
80.1%-90.0%			
	18	13	7

Note: Based on Senators' Map II B-6. Two districts on the line—the district for Ogemaw, Iosco, Clare, Gladwin, Arenac, Isabella, and Midland Counties (No. 8, Senators' Map II B-6) and the district for Oceana, Newaygo, Mecosta, Montcalm, Gratiot, and Ionia Counties (No. 9, Senators' Map II B-6)—are counted as districts in the southern part of the Lower Peninsula.

CONCURRING OPINION

O'SULLIVAN, Circuit Judge, concurring: Joining in the sound opinion of Judge Kaess, I would like to add some observations as part of my concurrence. The task of this panel is to determine how far we may or should go in telling the majority of the people of a state what they can and what they cannot do. It is now our burden to find that line beyond which we may not go without arrogating to ourselves functions and prerogatives that, in the scheme of our government, do not belong to us. The power to legislate is not solely possessed by the national Congress, or State legislatures, but may be exercised directly by the people when they adopt, amend, or repeal a constitution. We recognize at once that, since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, and *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, it is no longer debatable that the Federal government, acting through its courts, may, within permissible limits, find illegal and strike down acts of legislatures which clearly offend the United States Constitution. We need here, however, to inquire how far today's law has extended the reach of judicial veto power.

Foremost among current decisions on apportionment are *Baker v. Carr*, 369 U.S. 186, *Gray v. Sanders*, 372 U.S. 368, and *Wesberry v. Sanders*, 26 U.S. L. Week 4142 (U.S. Feb. 17, 1964). We believe that the decision we now make is consistent with these judicial landmarks. *Baker v. Carr* deals directly with the subject before us. *Gray v. Sanders* and *Wesberry v. Sanders* are not, in our view, of controlling pertinence here. In *Wesberry*, Justice Black made clear that his qualified approval of the current "one man, one vote" slogan was limited to what he said was commanded by Article I, Section 2, of the United States Constitution.[1] *Wesberry* deals exclusively with districts from which are

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[1] Justice Black said, "We hold that, as construed in its historical context, the command of Art. I §2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (32 U.S. L. Week 4143.)

chosen representatives to the United States Congress. In a footnote, Justice Black stated that, "We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment." (32 U.S. L. Week 4143).

If the *Wesberry* decision controlled the case at bar, we would be of the opinion that the "nearly as practicable" qualification to the "one man, one vote" principle would immunize the Michigan Constitution's apportionment of House of Representative districts from judicial attack. For the decision now required of us, we need not consider whether its apportionment of the thirty-eight senatorial districts would stand against the "one man, one vote" test. We do not believe that it is subject to such test.

We look here to be informed by *Baker v. Carr*. No United States Supeme Court case has yet decided that a constitution adopted by the people of a State is subject to the same attack as the enactments of their respective State legislatures.[2] Neither has the United States Supreme Court yet decided that a State will not hereafter be permitted to have either branch of its legislature apportioned other than on a strict population basis. For the decision we now make, however, we assume that a State's constitution is as vulnerable to judicial attack as the acts of its legislature.

Turning then to *Baker v. Carr* we do not read it as saying that the "one man, one vote" standard had to be followed by Michigan in adopting a formula for apportioning its senatorial seats. We think that its clear command goes no further than forbidding *invidious discrimination* in a State apportionment plan. A court, concluding that a particular plan is invidiously discriminatory, may declare its unconstitutionality vis-a-vis the Fourteenth Amendment of the United States Constitution. Absent such vice, a plan may be constitutional even though considerations other than strict population may have been part of the motivation

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[2] The Supreme Court of Michigan in *Scholle v. Hare*, 367 Mich. 176 (pending on certiorari *sub. nom. Beadle v. Scholle*) did so decide.

for its adoption. Out of the several opinions in *Baker v. Carr*, come such statements as:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination' as it does when it selects 'a particular race or nationality for oppressive treatment.' Universal equality is not the test; there is room for weighing. As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'" *Douglas, concurring*, 369 U.S. 244, 245.

> "No one * * * contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting." *Clark, concurring*, 369 U.S. 258.

> "Not believing that numerical equality of representation throughout a State is constitutionally required, I would not apply such a standard, albeit a permissive one. * * * Moreover, there is no requirement that any plain have mathematical exactness in its application. Only where, as here, the total picture reveals incommensurables of both magnitude and frequency can it be said that there is present an *invidious discrimination.*" *Clark, concurring*, 369 U.S. 260 (Emphasis supplied.)

> "In *MacDougall v. Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.'" *Stewart, concurring*, 369 U.S. 265, 266.

While the opinion of Justice Brennan, speaking for the Court, does not employ language of like import to the above quotations from Justices Douglas, Clark, and

Stewart, we find nothing therein detracting from the validity of their observations. Justice Brennan was careful to define the reach of his decision as follows:

> "In light of the district court's treatment of the case, we hold today only (a) that the Court possesses jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the apportionment statutes." *Brennan, speaking for the Court*, 369 U.S. 197, 198.

If it is now the law that no representative body—be it the United States Congress, a State legislature, a county board of supervisors, a city's council or board of aldermen, or any other representative body whose members are elected from districts—can legally exist unless there is population equality between districts, then the task of the judiciary is simple and easy. We need do no more than, by judicial command, forbid anything else.

If, however, anything other than obedience to such an easy rule is to be tolerated—if something be left to the considered judgment of the majority of a State's people or its legislatures—shall we make precise how much leeway we, the judges, will let them have? We must, of course, strike down invidious discrimination and any other impermissible plan, such as one where inequalities arise from the race, creed or color of those affected by it. Where we find, however, that the lack of precise equality in an apportionment plan is not gross and is the product of reasonable and intelligent weighing of what is fair and conducive to the total good, shall we intrude to say that only our judgment and discretion will do? If some departure from mathematical exactness is permissible, what is the range of allowable percentages in such departures? Will 2%, 5% 10%, 20% or 25% be acceptable to us? If the Sixth Circuit says that 10% is the outer limit, will the Seventh Circuit be forbidden to put up with 15%? Shall the discretion or political judgment of a majority of a three-judge district court control?

We think it pertinent to say that the facts in *Baker v. Carr*, *Gray v. Sanders* and *Wesberry v. Sanders* bear no resemblance to those which are the background to the case before us. Michigan's plan for apportioning the seats in its House and Senate will not create or tolerate any "rotten boroughs." Its 80-20 plan for the Senate and its almost precise adherence to population equality in the House exhibits intelligent and rational design and does not in any degree reveal "incommensurables of both magnitude and frequency." *Baker v. Carr*, 369 U.S. 260.

Michigan's new Constitution was not the product of hurried or partisan maneuvering, or of gradual and hidden erosion of the people's rights. The people of Michigan, by popular vote, decided to have a constitutional convention. Pursuant to that mandate, a convention was assembled. Out of that assembly's free and unfettered interchange and collision of ideas—between political scientists, practical politicians, lawyers and students of constitutional government, labor leaders, industrialists, and just plain citizens of all races and creeds—came for consideration by the entire people of Michigan a proposed constitution. The question of whether this proposed people's legislation was wise and proper was vigorously contested at the convention and during the months that followed its submission for adoption or rejection by the people. All of its provisions were exposed to the searching light of today's media of public information. Thus informed, the people of Michigan made a deliberate choice and, though the closeness of the vote portrays the vigor of the people's search for what was right, the legislation here under attack was adopted by a majority vote of the people of this State. In making this deliberate choice, every man's vote was equal to that of any other. Unless the attacked Article of the Michigan Constitution is infected with illegality, a decree, granting the relief sought by plaintiffs, would dilute and debase the vote of every elector who cast his vote with the majority. Finding no such illegality, we decline to do so.

A canvass of the vote on the Constitution discloses that its adoption did not come about through the predominant

power of any part of the State over another. It does not disclose a victory of one race or creed over another; it does not disclose a victory of Republicans over Democrats;[3] it was not a victory of the rural over the urban, or of capital over labor; neither can we discern any influences or pressures except what are traditional in American political contesting. It is true that issues other than Article IV, Sections 2-6, played a part in the vote pattern, but the Article before us was prominent in the public discussions which preceded the voting.

No clear picture emerges from a study of the vote except that the majority of the people of Michigan made a considered and deliberate choice. For our conclusion, we assume, as plaintiffs insist, that we, the federal judges, may have the right, under some circumstances, to tell the people of Michigan that they cannot have what they chose for themselves. We are not persuaded, however, that the 1963 choice of a Constitution by the People of Michigan was a deliberate or unwitting creation of an invidiously discriminatory plan of apportionment.

The complaint should be dismissed.

Clifford O'Sullivan,
United States Circuit Judge.

Dated at Port Huron, Michigan,
this 16th, March, A.D., 1964.

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[3] Wayne County, Michigan, recognized now as a Democratic stronghold, usually voting on a basis of about 65% Democratic and 35% Republican, voted in the constitutional election 245,410 for and 294,629 against the Constitution. The five most populous counties, whom the plaintiffs assert are the victims of discrimination, in total voted 441,530 for and 457,294 against the Constitution. Rural counties, which are claimed to be unfairly favored by the discrimination which plaintiffs assert is in the Constitution, in many instances voted strongly against the Constitution, and it would have gone down except for the heavy favorable vote in the urban populous counties. It might be thought that this discussion of political parties should not be mentioned. The judiciary, however should not pretend such naivete as not knowing that politics is here involved.

APPENDIX B

DISSENTING OPINION

Stephen J. Roth, District Judge.

With due deference to the views of my colleagues, so ably expressed in Judge Kaess' majority opinion, and in Circuit Judge O'Sullivan's concurring opinion, I find myself unable to agree and therefore dissent.

The issue before the Court is whether the Michigan Constitution of 1963, so far as it pertains to the establishment and arrangement of State Senate and House districts, denies to plaintiffs, and to others similarly situated, the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States and such other rights as are secured to plaintiffs by law.

The short answer to that is that it does.

The 1963 Constitution, so far as it relates to the apportionment of the Michigan Legislature, has fatal flaws which will not pass constitutional inspection. We speak now of the Federal standards, but, suggest, as we shall later explore, that it fails to pass State constitutional standards as well. But more of that anon.

The time setting of the adoption of the proposed Constitution by the convention should be noted. The convention convened October 3, 1961. *Baker v. Carr*, 369 U.S. 186, was handed down on March 26, 1962; *Scholle v. Hare*, 367 Michigan 176, was handed down July 18, 1962; and a stay order by a Justice of the United States Supreme Court issued July 27, 1962. Certain changes submitted to the apportionment provisions of Article IV of the proposed Constitution at 11:00 o'clock the morning of August 1, 1962, the last day of the convention, despite the protestations of at least one delegate that haste might result in "irremediable error." "It must be remembered," he said, "that once the convention adjourns sine die, its powers are exhausted and,

however bad an error may be, that error cannot be corrected." (Constitutional Convention Record, page 3299.)

Whether because of haste or otherwise, the provisions of the proposed, and later adopted, 1963 Consitution are in violation of the Fourteenth Amendment of the Constitution of the United States, as we shall more fully detail. The booby traps and fishhooks in its provisions respecting the establishment and arrangement of legislative districts, if given effect, result in the amendment of the proposition that:

"All men are created equal."
to
"All men are created equal—except city people."

It is true that the United States Supreme Court has, at least to this date, refused repeated invitations to interpret the nature of representative democracy in exact terms of the distribution of power among people, or to say to what degree the majority must control government. But one can legitimately and reasonably conclude from *Baker v. Carr*, 369 U.S. 186, and *Wesberry v. Sanders*, 32 L.W. 4142, that the Court is proceeding in the direction of a holding that "republican government" requires a popular democracy, which presupposes an equality of individuals and their voting power. Even now *Baker v. Carr* stands for the proposition that discrimination in apportionment will be permitted *only* if based upon a rational classification, but not if it is invidious, i.e. arbitrary or capricious.

It is submitted that the Supreme Court handwriting is on the wall, for him who will to read. *Wesberry and Baker* are not the last words; they are only the latest. How far that Court will go, or rather, how fast it will go, is something we have to leave to another day. It was observed by De Tocqueville some 150 years ago that the distinctive characteristic of America was a constant striving for equality.

The built-in, "fair" advantage in the 1963 Constitution is completely at odds with our concept of the equality of man. How can one justify an apportionment system which

favors a segment of the population of the state? We must remember that plans of apportionment are devised by men to control the affairs of men; and remember too that men, in self-interest, are sometimes capable of rising above principle to grasp control of government. As pointed out by Judge Doyle in his dissent in *Lisco v. Love*, (Colo.), 219 F. Supp. 922, page 943:

> "Governments are devised to arrange the affairs of men. Economic interests are remarkably well represented without special representation. It is dangerous to build into a political system of favored position for a segment of the population of the state. There exists no practical method of ridding ourselves of them, and long after the institutions pass, the built-in advantage remains even though it is at last only a vestige of the dead past."

To get to the heart of the issue before us, I repeat the question I put to counsel during the oral arguments in this case:

> "What is wrong with people?"

The framers of the Declaration of Independence made it the basis of our government that all men are created equal and endowed with certain unalienable rights. In doing so, they pointedly repudiated Aristotle's notion that:

> "* * * some should rule and others be ruled is a thing, not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule."

The conception of political equality has been retained and reinforced throughout the history of this nation, from that Declaration, the United States Constitution, Lincoln's Gettysburg Address, and on through the constitutional amendments.

Our fundamental beliefs and the values by which we live as a nation demand an acknowledgment that men have the capacity to govern themselves, that we have faith in the

rights of the individual. They cast aside the notion that our neighbor does not count, or that he counts for more or less than his neighbor.

In our scheme of government, there is no provision for nor room for, a caste system, even of the wise and the good. Nowhere is there to be found even an intimation that some of our citizens have greater or less political capacity or power than others.

Even if we disregard, for the moment, the foundation stones of the federal government, and particularly Article IV, Section 4 of the United States Constitution, guaranteeing to every state of the union a republican form of government, and look only to the State of Michigan and its fundamental law, we find explicit recognition of the worth and value of the individual. See "An Ordinance for government of the territory of the United States, northwest of the River Ohio," The Confederate Congress, July 13, 1787, Articles of Compact, Sec. 14, and Article II, Bill of Rights:

> "The inhabitants of the said territory *shall always be entitled to* the benefits of the writ of habeas corpus, and of the trial by jury; of *a proportionate representation of the people in the legislature*, and of judicial proceedings according to the course of the common law."

And see also the Constitutions of the State of Michigan, 1835, 1850, and 1908, which provided for substantial equality among the people in their representation in both Houses of the State Legislature.

Both our basic federal documents and the basic state documents are premised on the basic fact of our form of government: All men are created equal. As pointed out in *Giddings v. Secretary of State*, 93 Michigan 1, at page 7:

> "It was never contemplated that one elector should possess two or three times more influence, in the person of a Representative or Senator, than another elector of another district. *Each, insofar as it is practicable, is, under the Constitution, possessed of equal*

power and influence. Equality in such matters lies at the basis of free government. It is guaranteed, not only by the Constitution, but by the Ordinance of 1787, organizing the territory out of which the State of Michigan was carved."

The majority opinion and the argument of intervenors both lay considerable stress upon the assertion that the county should be recognized as a basic unit for purposes of apportionment. Alternately, intervenors argue that history should be recognized in the consideration of the validity of the apportionment arrangement in the 1963 State of Michigan Constitution. What history? And who holds the proxy for history? Here again, *Williams v. Secretary of State*, 145 Michigan 447, at page 449, makes it plain that the county was not then a basis of apportionment. The dissenting opinion of Mr. Justice Talbot Smith, in *Scholle v. Hare*, 360 Michigan 1, at page 58 says:

"Michigan does not employ the political unit basis."

As for the proposition that the 1963 Michigan Constitution was "solemnly" adopted by the people (by a majority of considerably less than one per cent)—to begin with, there may well be a serious question as to whether the constitutional convention was called in contravention of the Fourteenth Amendment. The 144 delegates to the Constitutional Convention, elected in April 1961, were allocated to and elected from the 110 State Representative districts and the 34 State Senatorial districts. See the Tennessee case now in the Supreme Court, *West v. Carr*, 370 SW 2d 469, Supreme Court Docket No. 706, which raises this question:

"Does the 1962 Tennessee Statute calling a Constitutional Convention to propose amendments to the State Constitution abridge the Fourteenth Amendment because the statute apportions convention membership on the basis of legislative apportionment formula rejected in *Baker v. Carr*, 369 U.S. 186?"

But let us lay aside this question. Let us turn our attention to the "Address to the People" which, according to the provisions of Act No. 8 of the Public Acts of 1961, Section 168.181 of the Compiled Laws of 1948, as amended, was to serve the purpose of:

> "* * * explaining the proposed changes in the present constitution, and the reason for such changes. * * *"

In its prolegmonena, the Address adopts the statement of Professor Paul Kauper, as to the mission of the delegates:

> "To fashion a fundamental order of government that preserves the continuity of our constitutional tradition by holding fast to that which is good, but which will be adequate to meet not only today's but also tomorrow's needs. * * *"

If that was the objective, then it is this writer's humble opinion that the mark was missed, for nothing is more fundamental to our form of government, be it national or state, than equality in representation * * * of people. In its explanation to the people of the state, there was an obvious misstatement of fact, see page 5, under the heading "The Legislative Branch," paragraph 2:

> "A *House of Representatives on a population basis* and a Senate on a combined population area basis (giving 80% weight to population and 20% weight to area) with as mathematically exact a system as possible for assigning a prescribed number of seats to each chamber. The application of these formulas will bring Michigan to the forefront of the states in the fairness and equity of its system for allotting the legislative representation among its population."

It is true that under Article IV, the fine print appears. But it is unlikely that the average reader, even if he read the Address, or the proposed Constitution, could have understood, without some training in political science, mathematics, and the law, and without extensive study, the ".7%," "county lines," and "75% to 125%" provisions, to

say nothing about "equal proportions." It has taken the members of this Court some considerable time to digest the meaning, in applied form, of these provisions. So that to say that the people of the State of Michigan solemnly adopted these precise provisions of the Constitution is an indulgence in rhetoric only. But even if we assume, arguendo, that they understood the implications of these provisions, it is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the philosophy of the Fourteenth Amendment teaches us that it is personal rights which are to be protected against the will of the majority. And as a matter of common knowledge, the proponents of the 1963 Constitution used as a selling point, that whatever defects it might possess could and would be corrected, but that overall it was a better basic law than its predecessor. If certain provisions of the 1963 Constitution are constitutionally defective, had it been adopted by a unanimous vote, it could not be left to stand. I take it that no one would postulate, at this late date, that because discriminatory racial legislation enjoyed overwhelming support in some of our states, it would be validated. Manifest inequality cannot be effectuated by a majority vote.

The fact of enactment of the new Constitution, even though by the slimmest of margins, generates restraint; but we cannot, true to our oath, uphold such provisions of it as are palpable infringements of the rights of individual citizens. The protection of constitutional rights is not to be approached pragmatically or expediently.

The delegates to the constitutional convention had no immunity from the United States Constitution. They were bound to be as responsive to that basic law as were the citizens who elected them. And when, as I believe to be true in this case, the mainspring of representative government is impaired, we should not preclude judicial relief. The entire thrust of today's legal climate is to end unconstitutional discrimination.

It is manifest by its very terms that the 1963 Constitution does not, as conceded by the majority, provide for a straight population formula even for the House of Representatives.

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If that had been the intention, it could have been accomplished easily by stopping after providing (Article IV, Section 3):

> "The House of Representatives shall consists of 110 members elected for two-year terms from single member districts apportioned on a basis of population. * * *"

This was not done, but the qualifications of "county lines," ".7%," and "not less than 75% nor more than 125%" were added.

It may be of significance that neither the Address to the People, briefs and arguments of intervenors, nor the majority opinion give any explanation of the magic figures ".7%," "75% to 125%," or "80-20." It seems to me that a justification of these were, and are, in order. None has been advanced.

A review of these provisions, as well as the provision for the establishment of an apportionment commission, leaves only the gratuitous to assume that they were not intended to promote minority control of the legislature. These provisions, as well as those relating to the arrangement of the Senate, are not accidental and inadvertent, but calculated and purposeful.

It appears that the majority of the delegates to the convention made a legal guess that if they came *close* to a straight population apportionment in the House, they could do whatever they pleased in the matter of the apportionment of the Senate. The imbalance is not by accident, but by design. Even the apportionment commission is allotted on an area basis, and in such wise as to make it virtually certain to fail to accomplish its mission.

The end result of the whole of the provisions with respect to apportionment is a guarantee that minority rule shall prevail; and in the course of time, they could not but accentuate the discrimination toward the majority of the citizens of the state.

We cannot say what the highest Court in the land will finally say with respect to the propriety of apportioning one House of a State Legislature on a straight population basis and the other on population and/or other factors. There are those who believe that such an arrangement will meet constitutional tests. It is unprofitable to hazard a guess. But in this case, we do not have to indulge in prophecy, for neither the House nor the Senate can be apportioned on a population basis if the qualifying provisions are complied with.

There is a serious question of the validity of the provisions for apportionment from another standpoint, as so ably pointed out by Mr. Justice Eugene Black, of the Michigan Supreme Court, in his memorandum, "In the Matter of the Apportionment of the Michigan State Legislature," (as yet unreported) March 1964:

> "The supremacy clause considered, the constitution of each of the States has written into it, firmly as if printed before the reader's eyes, a special and controlling proviso which in so many words says that, when that State's Constitution is capable of 2 constructions, one of which would conflict with some provision of the National Constitution, the other must prevail. Thus it is that the equality clause of the National Constitution complements and supplements and, in case of conflict, modifies to the extent of such conflict the Constitution of each of the States. The equality clause, is, indeed, 'as much a part of the Constitution of every State as its own local laws and Constitution.' (*Blythe v. Hinckley*, 173 U.S. 501.)"

The provisions of Article IV of the 1963 Michigan Constitution respecting apportionment cannot be read without considering Article I, Sections 1 and 2:

> "Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection."

"Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin * * *."

The guiding rule of constitutional construction from the time of Chief Justice Marshall down has been that no one provision is to be separated from the others and considered alone, but that all provisions bearing upon a particular subject shall be brought into view and interpreted so as to effectuate the great purposes of the instrument. See *Ullmann v. U. S.*, 350 U.S. 422. It is necessary, therefore, to construe Article IV, together with Sections 1 and 2 of Article I, and in the light of the requirements of the Fourteenth Amendment to the United States Constitution. So viewed, the provisions of the 1963 Constitution relating to the apportionment of the legislature cannot stand.

As a sidelight, it may be well to add that there is a serious question as to whether the proviso at the end of Article III, Section 2 squares with the guarantee clause of the Federal Constitution. The section provides that "The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising the powers of one branch shall exercise powers properly belonging to another branch *except as expressly provided in this constitution.*" (Italics supplied.)

Article IV, Section 6, Paragraph 7, then proceeds to allot to the Supreme Court of the State the power to make a legislative judgment (which plant to adopt, in the event the apportionment commission does not agree), and later provides for it to trade in its legislative beret for the judicial one (paragraph 8 of Section 6 of Article IV) and apply constitutional tests. The roles are obviously incompatibe.

If there is something wrong with the one person, one-vote formula of *Wesberry v. Sanders*, 32 L.W. 4142, neither pleadings, briefs, nor arguments in this case tell us why. If there are valid reasons for weighting the vote of one

person and shaving the vote of another, they have not been advanced. We hear the refrain that the minority must be protected. But what of the majority? What protection have they had in the legislature of the State of Michigan (and many other states) these many years, when that body has steadfastly refused to reapportion in accordance with the constitutional mandate?

The provisions of the 1963 Constitution give a preferred place in the scheme of government to the voter in the sparsely settled portions of the state. Is this because there is more space around him? Does this make him a better voter? By what constitutional or other legal rule or principle is assigned to him the right to vote the franchise granted to the millions of acres of federal and state park land and water?

Are the urban dwellers to be treated, to use Homer's words, like "dishonored strangers?" As Aristotle says:

> "The citizen who is partly excluded from the honors of the state is no better than a part alien. And when this partial exclusion is concealed, the object is that the privileged class may deceive them."

What manner of men are they whose votes shall be weighted?

And what manner of men are they whose votes shall be shaved?

And who shall decide which to weight and which to shave?

It is argued that the apportionment formulae for House and Senate in the 1963 Constitution give the majority a greater representation than has been the case in the past. To say that something is not as bad as it has been is not to say that it is right. The plaintiffs in this case, and others like them, are not asking for a handout but asserting a claimed constitutional right. This argument falls of its own weight, as does the argument that absolute mathematical precision cannot be achieved. To say that because mathematical precision cannot be attained does not

preclude coming as close to it as can be every ten years, nor does it justify a greater departure from equal proportions than necessary.

The teachings of United States Supreme Court cases beginning with *Baker v. Carr* to the present day I interpret as meaning that an apportionment cannot be permitted which would allow a blocking of major legislation desired by the majority of the electors of the State of Michigan. Effecting the will of the majority of the people of a state must be deemed the sine qua non of any constitutional plan of apportionment. This means that at least one House of the Legislature of Michigan must be apportioned on a strict equal-population basis as nearly as this can be accomplished, in order to meet the requirement of rationality, and to avoid any taint of invidious discrimination. It may be that it is permissible to apportion the other House on a basis which takes into account cogent and relevant factors other than population. These other factors, however, must be more meaningful than mere area; and the weight given to them should not be such as to destroy the foundation principle of majority rule, or result in invidious discrimination or irrationality in apportionment. In other words, giving effect to such other factor or factors must not be permitted to govern to such an extent that a majority of the population of Michigan is put into such an inferior position in respect to such other House that legislation needed for the good of the whole state might be blocked. No case is cited by my colleagues, by counsel, and none found by the writer, which recognizes area alone as a valid factor for apportionment purposes. The plain fact is that any meaningful, valid non-population factor invariably squares with the population distribution. Consider such matters as taxes paid, capital investments, assessed valuation of property, industry, etc. Each of these is tied irrevocably to people: area exists independent of any person.

Let us add a word about custom. The custom which emerges most clearly from a hard look at the history of

Michigan is the continuous refusal of the body constitutionally charged with the duty of periodic reapportionment to discharge its constitutional duty.

As pointed out in *Gray v. Sanders*, 372 U.S. 368, 9 L. Ed. 2d 821, at page 830:

> "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several candidates, underlies many of our decisions.
>
> "* * *
>
> "* * * and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the state."

And see Judge Bigg's opinion in *Sincock v. Duffy*, 215 F. Supp. 169, at pages 187 and 188:

> "Although population density, extent of agricultural and industrial development and expanding city and suburban and semi-suburban areas are deemed to be cogent factors in considering apportionment, no very persuasive factor justifying any very special treatment in the apportionment of the Senate of the General Assembly can fairly be said to lie in any purely geographical factor."

The issue for determination in this case is whether the disparities provided for and locked into the 1963 Constitution are so substantial and irrational as to constitute invidious discrimination so as to violate the equal protection of the laws—Fourteenth Amendment of the Constitution of the United States.

For the reasons I have given above, I would hold that the plant of apportionment of the Michigan Legislature, as provided for in the 1963 Constitution, with its inequalities, is not based upon a rational formula consistent with

constitutional requirements, and more specifically that such plan does not provide for the districting of either House of the Legislature on a population basis, and that the Senate districting plan, calling for an area factor to be employed, is arbitrary, capricious, and constitutionally unjustified. There is here no "practical equality" with "rational deviations."

This holding, if effectuated, means that the provisions of Article IV of the 1963 Michigan Constitution, except for Section 1, the first paragraph of Section 2, and that portion of Section 3, which reads,

> "The House of Representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population,"

are constitutionally void and of no effect; that the legislature under its general legislative powers can and should apportion both Houses of the Legislature, in accordance with Federal and state constitutional standards and limits, failing which, within a reasonable time, this Court should order elections for both Houses to be held at large.

Stephen J. Roth,
United States District Judge.

Dated: March 16, 1964,
Detroit, Michigan.

APPENDIX C

JUDGMENT DENYING PLAINTIFFS ALL RELIEF

This action came on for trial before a District Court of three judges, duly constituted under Section 2284, Title 28, United States Code, the members of which were the Honorable Clifford O'Sullivan, United States Circuit Judge, the Honorable Fred W. Kaess, United States District Judge, and the Honorable Stephen J. Roth, United States District Judge, and the issues having been duly tried and a decision having been duly rendered, the Honorable Stephen J. Roth dissenting,

It is ordered and adjudged that the plaintiffs be denied all relief, and that the action be dismissed on the merits, without costs.

Dated at Detroit, Michigan, March 16, 1964.

Frederick W. Johnson,
Clerk of the Court.

APPENDIX D

MICHIGAN CONSTITUTION, 1963

ARTICLE IV—Legislative Branch

Sec. 2. The senate shall consist of 38 members to be elected from single member districts at the same election as the governor for four-year terms concurrent with the term of office of the governor.

In districting the state for the purpose of electing senators after the official publication of the total population count of each federal decennial census, each county shall be assigned apportionment factors equal to the sum of its percentage of the state's population as shown by the last regular federal decennial census computed to the nearest one-one hundreth of one percent multiplied by four and its percentage of the state's land area computed to the nearest one-one hundredth of one percent.

In arranging the state into senatorial districts, the apportionment commission shall be governed by the following rules:

(1) Counties with 13 or more apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. After each such county has been allocated one senator, the remaining senators to which this class of counties is entitled shall be distributed among such counties by the method of equal proportions applied to the apportionment factors.

(2) Counties having less than 13 apportionment factors shall be entitled as a class to senators in the proportion that the total apportionment factors of such counties bear to the total apportionment factors of the state computed to the nearest whole number. Such counties shall thereafter be arranged into senatorial districts that are compact, con-

venient, and contiguous by land, as rectangular in shape as possible, and having as nearly as possible 13 apportionment factors, but in no event less than 10 or more than 16. Insofar as possible, existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards.

(3) Counties entitled to two or more senators shall be divided into single member districts. The population of such districts shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent of a number determined by dividing the population of the county by the number of senators to which it is entitled. Each such district shall follow incorporated city or township boundary lines to the extent possible and shall be compact, contiguous, and as nearly uniform in shape as possible.

Sec. 3. The house of representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population as provided in this article. The districts shall consist of compact and convenient territory contiguous by land.

Each county which has a population of not less than seven-tenths of one percent of the population of the state shall constitute a separate representative area. Each county having less than seven-tenths of one percent of the population of the state shall be combined with another county or counties to form a representative area of not less than seven-tenths of one percent of the population of the state. Any county which is isolated under the initial allocation as provided in this section shall be joined with that contiguous representative area having the smallest percentage of the state's population. Each such representative area shall be entitled initially to one representative.

After the assignment of one representative to each of the representative areas, the remaining house seats shall be apportioned among the representative areas on the basis of population by the method of equal proportions.

Any county comprising a representative area entitled to two or more representatives shall be divided into single member representative districts as follows:

(1) The population of such districts shall be as nearly equal as possible but shall not be less than 75 percent nor more than 125 percent of a number determined by dividing the population of the representative area by the number of representatives to which it is entitled.

(2) Such single member districts shall follow city and township boundaries where applicable and shall be composed of compact and contiguous territory as nearly square in shape as possible.

Any representative area consisting of more than one county, entitled to more than one representative, shall be divided into single member districts as equal as possible in population, adhering to county lines.

Sec. 4. In counties having more than one representative or senatorial district, the territory in the same county annexed to or merged with a city between apportionments shall become a part of a contiguous representative or senatorial district in the city with which it is combined, if provided by ordinance of the city. The district or districts with which the territory shall be combined shall be determined by such ordinance certified to the secretary of state. No such change in the boundaries of a representative or senatorial district shall have the effect of removing a legislator from office during his term.

Sec. 5. Island areas are considered to be contiguous by land to the county of which they are a part.

Sec. 6. A commission on legislative apportionment is hereby established consisting of eight electors, four of whom shall be selected by the state organizations of each of the two political parties whose candidates for governor received the highest vote at the last general election at which a governor was elected preceding each apportionment. If a candidate for governor of a third political party has received at such election more than 25 percent of such gubernatorial vote, the commission shall consist of 12 members, four of whom shall be selected by the state organization of the third political party. One resident of each of the following four regions shall be selected by each political

party organization: (1) the upper peninsula; (2) the northern part of the lower peninsula, north of a line drawn along the northern boundaries of the counties of Bay, Midland, Isabella, Mecosta, Newaygo and Oceana; (3) southwestern Michigan, those counties south of region (2) and west of a line drawn along the western boundaries of the counties of Bay, Saginaw, Shiawassee, Ingham, Jackson and Hillsdale; (4) southeastern Michigan, the remaining counties of the state.

No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces reserve, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective.

The commission shall be appointed immediately after the adoption of this constitution and whenever apportionment or districting of the legislature is required by the provisions of this constitution. Members of the commission shall hold office until each apportionment or districting plan becomes effective. Vacancies shall be filled in the same manner as for original appointment.

The secretary of state shall be secretary of the commission without vote, and in that capacity shall furnish, under the direction of the commission, all necessary technical services. The commission shall elect its own chairman, shall make its own rules of procedure, and shall receive compensation provided by law. The legislature shall appropriate funds to enable the commission to carry out its activities.

Within 30 days after the adoption of this constitution, and after the official total population count of each federal decennial census of the state and its political subdivisions is available, the secretary of state shall issue a call convening the commission not less than 30 nor more than 45 days thereafter. The commission shall complete its work within 180 days after all necessary census information is available. The commission shall proceed to district and appor-

tion the senate and house of representatives according to the provisions of this constitution. All final decisions shall require the concurrence of a majority of the members of the commission. The commission shall hold public hearings as may be provided by law.

Each final apportionment and districting plan shall be published as provided by law within 30 days from the date of its adoption and shall become law 60 days after publication. The secretary of state shall keep a public record of all the proceedings of the commission and shall be responsible for the publication and distribution of each plan.

If a majority of the commission cannot agree on a plan, each member of the commission, individually or jointly with other members, may submit a proposed plan to the supreme court. The supreme court shall determine which plan complies most accurately with the constitutional requirements and shall direct that it be adopted by the commission and published as provided in this section.

Upon the application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction, shall direct the secretary of state or the commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution.

APPENDIX E

FEDERAL STATUTES

42 U.S.C. §1983:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"*Proceeding in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

28 U.S.C. §1343:

> "*Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. * * *"

APPENDIX F

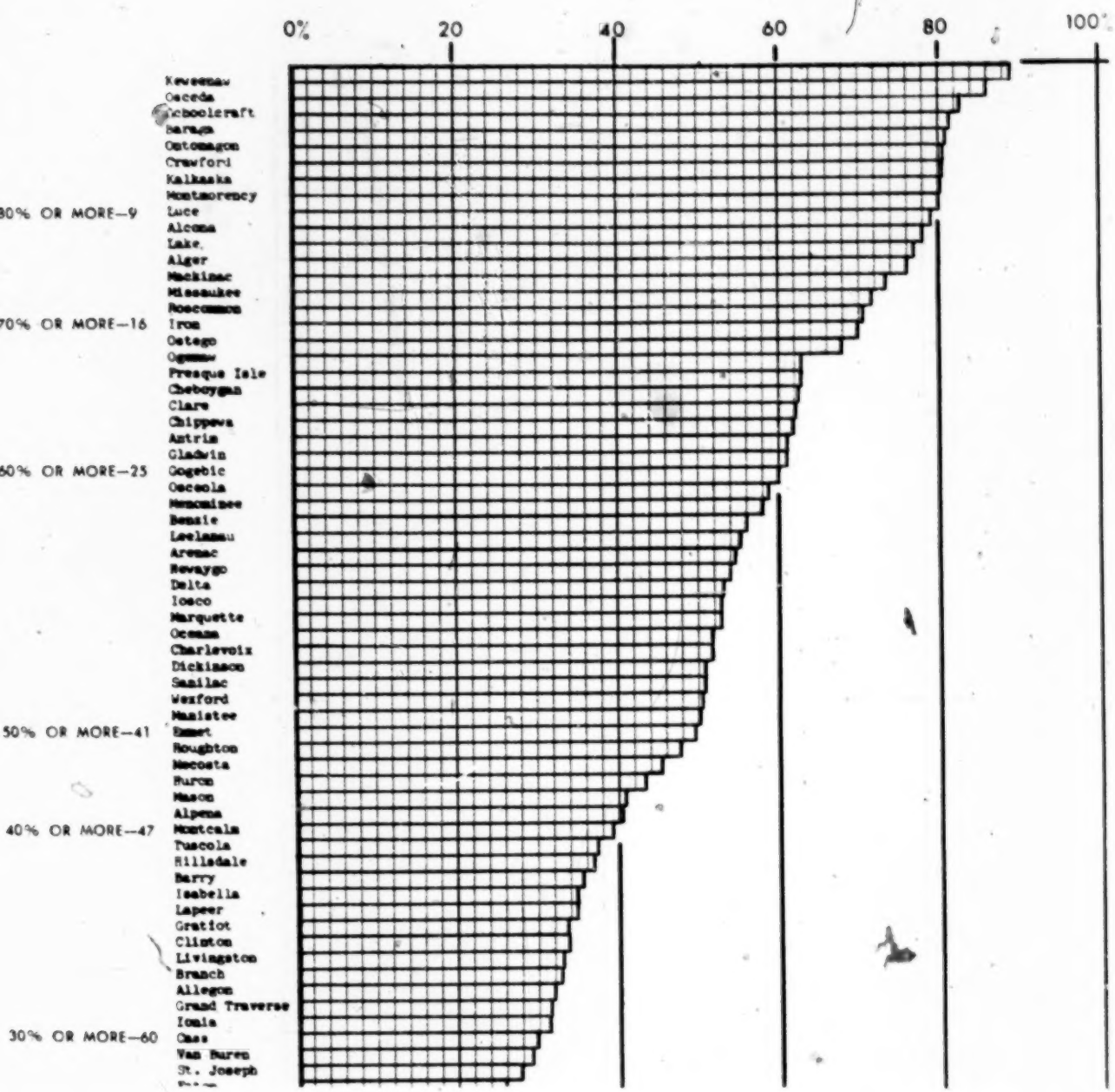
United States Constitution, Amendment XIV, §1:

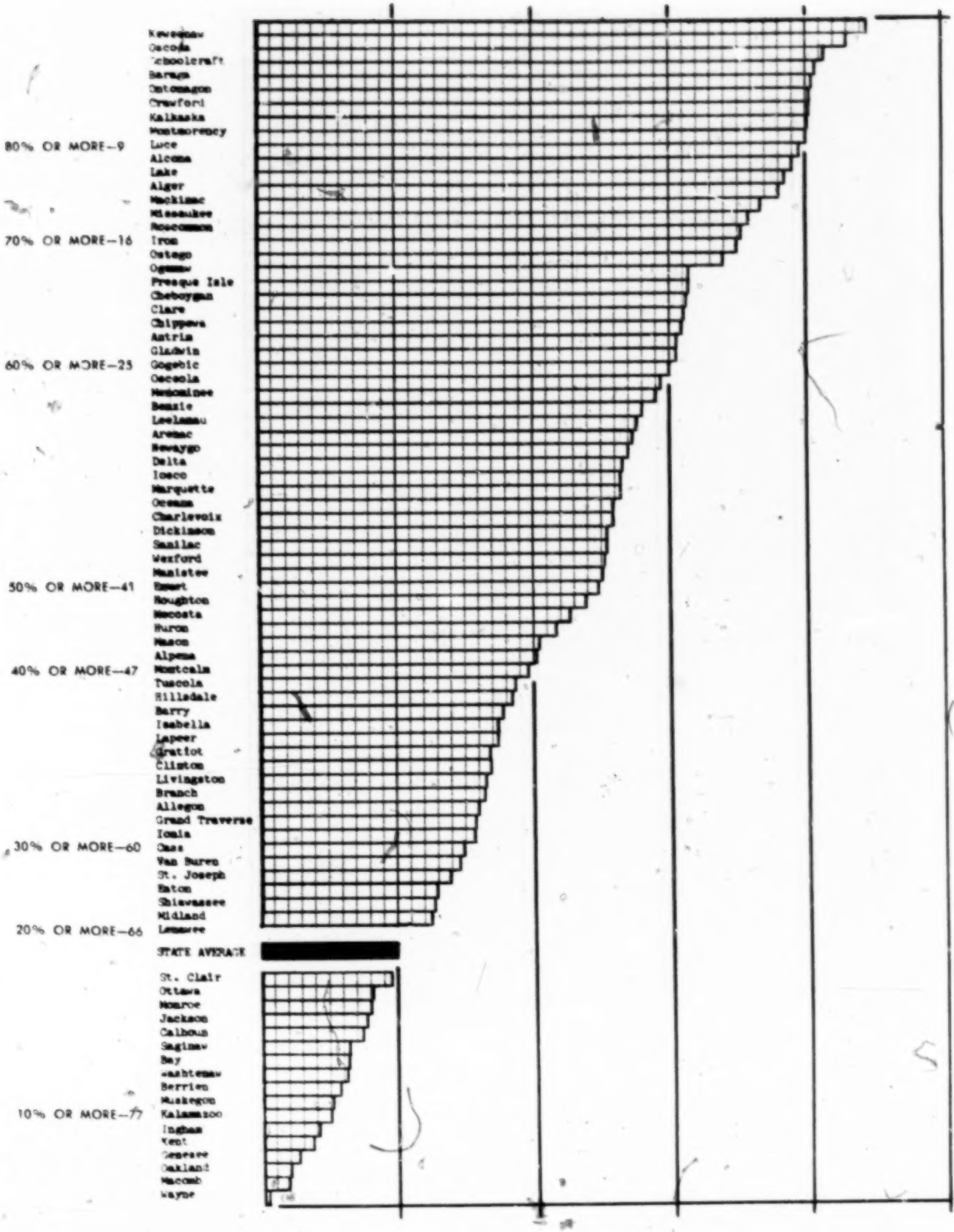
> §1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

Percent of Senate Representation Based on Area, By County, Under Article IV, Section 2, of Revised Michigan Constitution

("80-20" FORMULA)




Keweenaw
Oscoda
Schoolcraft
Baraga
Ontonagon
Crawford
Kalkaska
Montmorency
80% OR MORE—9
Luce
Alcona
Lake
Alger
Mackinac
Missaukee
Roscommon
70% OR MORE—16
Iron
Ostego
Ogemaw
Presque Isle
Cheboygan
Clare
Chippewa
Antrim
Gladwin
60% OR MORE—25
Gogebic
Oscecla
Menominee
Benzie
Leelanau
Arenac
Newaygo
Delta
Iosco
Marquette
Oceana
Charlevoix
Dickinson
Manistee
Wexford
50% OR MORE—41
Emmet
Houghton
Mecosta
Huron
Mason
Alpena
40% OR MORE—47
Montcalm
Tuscola
Hilledale
Barry
Isabella
Lapeer
Gratiot
Clinton
Livingston
Branch
Allegan
Grand Traverse
Ionia
30% OR MORE—60
Cass
Van Buren
St. Joseph
Eaton
Shiawassee
Midland
20% OR MORE—66
Lenawee
STATE AVERAGE
St. Clair
Ottawa
Monroe
Jackson
Calhoun
Saginaw
Bay
Washtenaw
Berrien
Muskegon
10% OR MORE—77
Kalamazoo
Ingham
Kent
Genesee
Oakland
Macomb
Wayne

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JOHN F. DAVIS, CLERK

SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1956

No. 302

WILLIAM C. MARSHALL, SHERIFF, SAGINAW COUNTY, ROBERT SCHULTZ, ALEXANDER D. PEZZINI and CHARLES A. ROGERS,
Appellants,
vs.
JOHN B. MARK, Secretary of State of Michigan, and
CHARLES S. HOUSER, Chief Assistant Attorney General of the State of Michigan, and
JOHN B. SWAINSON, JOHN V. SMITHERMAN, and HARRY C. TOWNSEND, Members of the Board of Education,
Appellees.

On Appeal from the Supreme Court of the County of Ingham for the Purpose of Review of Decisions of Boards of Review

REPLY TO APPEAL

WILLIAM E. KNEPPRATH,
700 American Bank and Trust Building,
Lansing, Michigan,
A. WILLIAM MARSHALL,
900 First National Building,
Detroit, Michigan (302),
Counsel for Appellants, Paul D. Steele, John W. Fitzgerald and Paul C. Younger.

DICKINSON, WRIGHT, MACKAY & CHILDS,
FRED W. KNEPPRATH,
PATRICK J. HEDWIDGE,
GEORGE A. MACKAY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 962

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,
Appellants,
vs.
JAMES M. HARE, Secretary of State of State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Appellees Frank D. Beadle, John W. Fitzgerald and Paul C. Younger, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed.

STATEMENT OF QUESTIONS INVOLVED

This case involves Michigan's system of legislative apportionment. Here, as in Colorado, it is a recently adopted state constitution which is attacked. While one house of the bicameral legislature established by the Michigan Constitution of 1963 is predicated as nearly as may be practicable on straight population, the other house is not.

There are two questions involved.

(1) Does the Fourteenth Amendment impose upon the people of each state having a bicameral legislature a national edict requiring the apportionment of members of both houses solely on a population basis (modified only to the extent required by practicalities), thereby denying to many of the people of Michigan the opportunity provided by its 1963 Constitution for adequate representation by legislators known and accessible to them and responsive to their special needs?

If this question is answered in the negative, the second question is:

(2) Did the people of Michigan create, through the legislative apportionment provisions of the Constitution of 1963, a rational and non-invidious basis for the representation of all its diverse and widely and unevenly distributed population?

ARGUMENT

I. THE NATIONAL EDICT

The Michigan Constitution of 1963 provides for a bicameral legislature. Michigan's House of Representatives is clearly predicated and apportioned on population "as nearly as may be practicable". See *infra*, p. 21. The Senate is not so apportioned. In recognition of the size and unique geography of Michigan and of the fact that the people living in the vast areas of the northern half of Michigan are widely scattered and have completely separate and diverse interests, the 1963 Constitution prescribes a formula for the Senate which gives those people reasonable and effective representation not possible under apportionment on population alone.

Except for some "weighting" of votes the people of northern Michigan would in practical effect be disenfranchised. The "weighting" prescribed by the Michigan Senate formula gives to the people in that area[1] reasonably effective representation, but nothing more. Comparison of a straight population apportionment of the Michigan Senate (Appendix I) to a probable apportionment under the Senate formula (Appendix II) reveals that the practical effect of the Senuate formula is to "shift" 4 seats from Michigan's most populous counties to the northern half of Michigan. Of course, the obvious and necessary result of the Senate formula is that some northern senatorial districts will have fewer constituents than some districts in the heavily populated southern section of the state. It is that disparity which is the only real thrust of appellants' challenge.

It is and must be appellants' proposition in attacking the 1963 Michigan Constitution that no matter how unreasonable, how unfair, no matter what the particular cir-

[1] Approximately 730,000 or 9% of Michigan's total population.

cumstances of a particular state may be, the Fourteenth Amendment of the federal Constitution prohibits the creation of any electoral district for any state or local elective officer other than on straight population as near as may be practicable.

In order to demonstrate the manifest unfairness of such a national fiat to the State of Michigan, appellees have included as Appendix I to this motion a map illustrating a straight population apportionment (as near as may be practicable) of the 38 seat Michigan Senate. Study of this map shows that more than one-half of the State of Michigan, despite all of its diverse and separate interests, would be entitled to representation by but 3 out of 38 senators. If this is required by the Fourteenth Amendment, the two Senate districts in northernmost Michigan (one encompassing the western two-thirds of the Upper Peninsula and the other the remaining portion of the Upper Peninsula and 9 Lower Peninsula counties) would each contain over 10,000 square miles. Each of these districts would be larger than each of the 9 smallest states. Seven Michigan Senate districts, including these two, would each be larger than each of the 2 smallest states.[2]

A. Characteristics of Michigan

Some conception of the reason why the people of the State of Michigan did not choose a straight population apportionment of their Senate may be obtained from a brief review of certain of the facts about Michigan considered by the District Court.

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[2] The senatorial districts created pursuant to the Senate formula of the 1963 Michigan Constitution will be sizeable in any event. (Appendix II) The 3 districts in the Upper Peninsula will each be larger than Connecticut or Delaware and 17 of the 38 senators will be elected from districts larger than Rhode Island.

Michigan's 7,824,018 human beings reside upon two peninsulas which lie athwart Lakes Superior, Michigan, Huron, Erie and St. Clair, the largest and most important bodies of fresh water in the world. Michigan is the only state in the Union which is divided into two substantial parts. Its more than 1,600 miles of coast line give it the longest coast line of any state, Florida and California ranking next; it is the largest state (58,216 square miles) east of the Mississippi River, except Georgia (58,876) and Florida (58,560). It is seventh in population among the states.

Michigan covers a surprising range of territory. It is a longer drive from Copper Harbor to the state capitol in Lansing than from Detroit to Knoxville, Tennessee; it is also farther from Monroe in the Lower Peninsula to Ironwood in the Upper Peninsula than from Monroe to Asheville, North Carolina.

Physically, it presents an uneven surface, ranging from the flat lake plains of the southern coastal areas to the high sandy waste lands of the northern half of the Lower Peninsula and ultimately to the Porcupine Mountains in the northwestern corner of the Upper Peninsula. Its climate is as varied as these distances and topograhical features would suggest. For example, the annual growing season ranges from 95 days in Iron and Alger counties to 184 days in Berrien county; and the average annual snowfall ranges from 168.5 inches in Houghton county to 27.0 inches in Lenawee county.

One of the results of the wide disparities in climate and productivity of the land has been that Michigan produces a tremendous variety of agricultural products. Most of the prime agricultural land is located in the southern half of the Lower Peninsula. The production of grains, sugar

beets and cattle is concentrated in the thumb, middle central and south central portions of the state. On the other hand, fruit production is concentrated in a thin border along Lake Michigan.

Extensive lumbering and related wood products industries continue to operate in the Upper Peninsula and upper portion of the Lower Peninsula.

Approximately 40% of the total mineral wealth in Michigan is produced in the 9 western counties of the Upper Peninsula. The mining of iron ore is concentrated in Marquette, Menominee and Gogebic counties while the mining of copper is centered in Houghton, Keweenaw and Ontonagon counties.

Michigan also enjoys a robust twelve month outdoor tourist season which thrives in the northern sections of the state where most of the land is unsuitable for farming.

Heavy manufacturing, principally related to automotive products, steel and chemicals, is concentrated in a U-shaped belt of southern Michigan counties extending southeastward from Bay County to Wayne County, westward across the state to Berrien County and northward to Muskegon County. In four of these counties (Muskegon, Midland, Genesee and Macomb) at least 50% of all employed persons are engaged in manufacturing.

The concentration of heavy industry, farming, tourism, lumbering and mining in different sections of the state is reflected in the differing general economic and social characteristics of the people in these different sections.

The number of persons per square mile varies from 4.4 to 6.1 in the northern Michigan counties of Keweenaw and Oscoda to 4392 in Wayne County. The median school years completed is lowest in Keweenaw at 8.5 and highest

in the southern counties of Oakland, Midland and Ingham at 12.1 and Washtenaw at 12.2.

The highest per capita and per household buying income is centered in the industrial belt of the Lower Peninsula and particularly in its southeastern corner. The per household buying power ranges from $3,485 and $3,771 in Lake and Keweenaw counties to $7,141 in Wayne, $8,951 in Oakland and $8,657 in Washtenaw.

Appellants' primary challenge to the 1963 Michigan Constitution is the assertion that the Fourteenth Amendment requires that each state of the Union be apportioned solely on the basis of equal population, and therefore that the people of Michigan lack power and freedom to choose a system of senatorial apportionment that recognizes their disparate conditions and needs, which have here been briefly reviewed. Judicial imposition of the mechanistic doctrine of "one-man, one-vote" upon the citizens of sparsely settled northern Michigan would unjustifiably relegate their separate and distinct needs to a position of low priority or even elimination on the legislative docket. The District Court refused to do so. Appellants' demand that this Court do so is *the* issue in this appeal.

By their 1963 vote the people of Michigan recognized that representation of the people living in the northern half of their state[3] by only 3 of 38 legislators in one house, when coupled with a comparable lack of seats in the other house, is tantamount to no representation at all.

It is little short of ridiculous to suggest that the people of northern Michigan would be properly represented by senators—no matter how fair-minded—elected by the

---

[3] This region was accurately described by Judge Kaess in the majority opinion below as "impoverished".

urban districts of southern Michigan. These senators would be handicapped by lack of knowledge of the local problems, interests and needs of people living over 600 miles away. More important, it must be obvious that in our representative form of government senators are primarily responsible to their constituents, i.e., the people who elected them. Since the people of northern Michigan do in fact have different problems, needs and desires from those of the rest of the state, they ought to be entitled to reasonable and politically effective representation by senators who have personal knowledge of their problems and who are directly responsible to them.

Indeed, appellees suggest that a legislative districting system which grants only 3 of 38 legislators in one house to the people in one-half of Michigan, far from guaranteeing equal protection of the laws to the people of Michigan, would in fact deprive a substantial segment of Michigan's population of such equal protection.

B. The "Federal Analogy"

In deciding what form of government the State of Michigan should have, its people, having the benefit of 175 years of experience with the Congress of the United States which has a population-based lower house and a non-population-based upper house, adopted in 1963 an analogous apportionment system for its legislature.

Some political scientists and lower courts have developed, during the current litigation over state legislative apportionment, a technical argument by which they hope to prove that the "federal analogy" has no application to the apportionment of a state legislature.

The argument relies upon the "great compromise" by which the small states surrendered a part of their sovereignty by accepting a population-based House, in return for which the large states conceded to the smaller states a voice in the Senate totally unrelated to population. Obviously, the adoption in 1963 of a comparable legislative system by the people of Michigan did not involve a comparable sacrifice of sovereignty by its political subdivisions.

However, this distinction totally ignores the fundamental issue!

We submit that the Fourteenth Amendment invalidates *invidious discrimination* only.

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination.' as it does when it selects 'a particular race or nationality for oppresive treatment.' See *Skinner v. Oklahoma*, 316 U.S. 535, 541. Universal equality is not the test; *there is room for weighting.* As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'" Douglas J., concurring in *Baker v. Carr*, 369 U.S. 186, 244-245. (Emphasis supplied.)

Appellants have only one real argument—any legislative system which does not apportion both houses on a *per capita* basis, as nearly as practicable, is invidiously discriminatory and *malum in se*. If appellants are correct, it must necessarily follow that for 175 years the basic structure of the Congress of the United States has been similarly invidious. Nothing in the historical background of the federal system immunizes it from this criticism. No "great compromise" renders benign a system which is inherently evil.

Appellants assert that the formula for the Michigan Senate is invidiously discriminatory because (i) 57% of the state's population (in the 5 largest counties) will receive 47% of the Senate seats, (ii) 40% of the state's population could theoretically control the Senate, (iii) the probable maximum population disparity between districts will slightly exceed 4 to 1, and (iv) an area could theoretically receive a senator even though it was "substantially or totally uninhabited." If so, the apportionment of the United States Senate is malicious beyond comparison: (i) 57% of the nation's population (in the 11 largest states) receive 22% of the Senate seats, (ii) 17.44% of the nation's population can control the Senate, (iii) the maximum population disparity between Senate districts exceeds 74 to 1, and (iv) each of the 50 states—including Alaska, much of which is uninhabited—is guaranteed 2 senators.

Appellants further assert that the Michigan House formula is invidiously discriminatory against *urban* voters (despite the close correlation between the population in each county and that county's total number of seats as set forth in Table 1, *infra*, p. 21) because there will be a population disparity of 2 to 1 between two *rural* districts in Michigan. Even if every member of the United States House of Representatives were elected from a district exactly equal in population to every other district within a particular state pursuant to the direction in *Wesberry v. Sanders*, 376 U.S. 1, the population disparity between Alaska and Maine would still exceed 2 to 1.

Can this Court in good conscience tell the people of Michigan who patterned the 1963 apportionment of its legislature upon the federal system: "No, you cannot avail yourselves of the 175 years of experience the United States has had with this apportionment of Congress—to do so would be invidious."?

It must be obvious to even the most biased of observers that the "great compromise" was much more than an expedient accommodation between sovereign states. It was an accommodation of two conflicting political theories. This Court recognized in *MacDougall v. Green*, 335 U.S. 281, at page 283, that the United States Constitution protects the interests of the political minority by giving it unequal representation in the Senate. The Senate, therefore, is the embodiment of one major political theory. As stated by Justice Edwards[4] of the Michigan Supreme Court in *Scholle v. Secretary of State*, 360 Mich. 1, 91-92:

> "From the very founding of this republic, this nation has contained 2 diverse political forces—one of which has espoused pure democracy, and the other of which has sought to check it. There actually were 2 great compromises in the writing and the adoption of the Constitution itself without which indeed the United States of America might never have come into being.
>
> * * * * *
>
> "The other great compromise was arrived at in drafting of the Constitution. The Federalists succeeded in taking great powers from the States. In return, they had to give equal representation in the senate to all States regardless of size or population. Federalist Papers, No. 62. Substantial inequality of voting strength as to the United States senate was thus built into the Constitution long before the Fourteenth Amendment."

Thus the governmental structure of the United States has, from its inception, reflected the political theory which sought to provide political protection and a legislative voice for the minority. It might also be noted that the members of this Court and the President of the United States are

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[4] Now a Judge of the Sixth Circuit Court of Appeals.

chosen on a constitutional basis which ignores the standard of straight population. The President of the United States is chosen by an Electoral College which permits a minority (43.21%) of the people to choose the President. The President in turn appoints the Justices of this Court, traditionally taking into account different sections of the country regardless of population. Moreover, these appointments are subject to the advice and consent of a majority of the Senate, which can be controlled by as little as 17.44% of the people.[5]

C. Historical Context of Fourteenth Amendment

Appellants' institution of this action is evidence enough that the "great compromise" did not settle the question of legislative protection of minorities. Today, those who oppose the checks inherent in our constitutional system are attempting to use the Fourteenth Amendment to do that which was specifically rejected at the time of the creation of this nation.

This effort finds no support in the history of the adoption of the Fourteenth Amendment. Justice Edwards recognized this fact in *Schoile, supra*, at pages 92-93:

> "The interpretation of the Fourteenth Amendment equal protection clause contended for herein would forbid any State from having a constitutional scheme for legislative representation in either house on any basis other than one which results in substantial voting equality.

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[5] Michigan, on the other hand, elects its executive and its judicial branch in an at-large election.

> "No matter what the future may bring in relation to this contention, it certainly was not the interpretation of the Fourteenth Amendment placed thereon by the States which ratified it. Nor is it that adopted by the United States congress subsequently in admitting States to the Union. Nor is it the interpretation current among the majority of the 50 States of the Union at present."

This Court has recently recognized the importance of the historical context surrounding the adoption of a constitutional provision. In *Wesberry v. Sanders, supra*, this Court construed Article 1, Section 2, of the United States Constitution to require that all congressional districts within a state be created as nearly as is practicable on a "one-person, one-vote" standard. The basis for this landmark case is, almost exclusively, the "historical context" within which Article 1, Section 2, was adopted.

This Court is now asked to hold that the Fourteenth Amendment imposes a similar requirement in the apportionment of both houses of every state legislature. The historical context within which the Fourteenth Amendment was adopted absolutely rejects such construction. See *Scholle v. Secretary of State, supra*, at page 96:

> "* * * 20 of the 37 States constituting the Union at the time of the adoption of the Fourteenth Amendment had in their own constitutions provisions which prevented at least 1 legislative house from being based upon the principle of equality of popular representation."

The Constitutions of 8 of the 13 states subsequently admitted to the Union also contained provisions for the election of at least one legislative house on a basis other than straight population. *Scholle*, 360 Mich. 1, 93-98. Consequently, the Fourteenth Amendment, if construed in its

historical context including its subsequent interpretation by Congress and by the people of the areas choosing statehood, cannot be said to require every state to apportion both houses of its legislature solely on a population basis.

With wisdom and a sense of political realism, the framers of the United States Constitution perceived the necessity of creating a system for apportioning the Congress which satisfied two conflicting, yet valid, political theories. Nothing in appellants' arguments should convince this Court that the Fourteenth Amendment prevents the people of Michigan from utilizing a system for apportioning Michigan's legislature which likewise reflects the philosophy of checks and balances.

D. The Governmental Structure of Michigan

In contrast to the situation present in *Baker v. Carr*, 369 U.S. 186, this is not a case in which the people were rebuffed by an entrenched legislature: the *people* of Michigan chose its legislative apportionment system. Nor is this a situation in which the people of Michigan have no effective way to change their governmental structure. Article XII, Section 2, of the Michigan Constitution of 1963 provides that 10% of the electorate may at any time initiate a proposal to amend or revise the Constitution.[6] Furthermore, Article XII, Section 3, *requires* submission to the people of the question of general revision of the

[6] Between 1908 and 1961, 35 constitutional amendments were placed on the ballot by this method and 10 were adopted. In addition Article XII, Section 1, authorizes the legislature to propose amendments which must be submitted to the people. From 1908 through 1961, 59 of 91 proposals placed on the ballot by this second method were adopted.

Constitution in the 1978 general election and every 16 years thereafter.

We submit that the District Court was clearly correct in concluding that the Michigan governmental system created by its 1963 Constitution is fair to *all* the people in Michigan. Both the executive and judicial branches of the government are selected in at-large elections and one-half of the legislature, i.e., the House of Representatives, is selected by the people in direct relationship to their numbers. See Table 1, *infra*, p. 21.

Moreover, the urban people, i.e., people living in Michigan's ten "urbanized areas" as defined in the Department of Commerce, Bureau of Census, 1960 Final Report PC (1)-24A,[7] will control 22 or 23 of the 38 Senate seats, which is almost the exact number of seats to which they are entitled on the basis of their population. (Appendix IV, p. 11b). At the same time the 9% of the state's population living in the northern half of Michigan, who have needs and interests unlike those of the people in the rest of Michigan, are given a "weighted" voice (18% of the seats) in the Senate to enable them to be heard effectively in the legislative halls.

The necessary effect of appellants' construction of the Fourteenth Amendment would require this Court to destroy the structure of the Michigan legislature and to impose a uniform legislative system on *all* states whose legislatures are bicameral.[8] They assert that the language "No state

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[7] By Bureau of Census definition, an urbanized area contains "at least one city of 50,000 inhabitants or more in 1960, as well as the surrounding closely settled places and unincorporated areas" that meet certain criteria.

[8] In some states the system advocated by appellants may be the only rational, non-invidious system of government.

shall * * * deny to any person within its jurisdiction the equal protection of the laws" means that the people of Michigan are denied the choice their forefathers made in creating the form of our federal Congress. The fiat which appellants seek to impose upon the people of Michigan by judicial decree (after the people have chosen otherwise in a statewide election) would take from the people the right to choose their own form of government. This right of choice is the *sine qua non* of government by consent of the people.

E. Significance of Voter Approval

We do not advocate that the people of any state have the right to violate the federal Constitution. We agree with Mr. Justice Black that "the people of a state can no more violate the Constitution by referendum than by law."[9] We do assert, however, that this Court should not abrogate the will of the people unless their action was *per se* illegal. At the very least it is potent evidence against appellants' claim of invidious discrimination that Michigan's legislative apportionment was adopted by a majority of the people of Michigan in a vote at large. Indeed, the people's choice should be considered *prima facie* rational and reasonable. Certainly this is so if the issue is narrowed to one of degree, i.e., whether or not the extent of deviation from straight population is reasonable or invidious under the circumstances.

We quote Judge Clifford O'Sullivan (Circuit Judge, 6th Circuit) in his concurring opinion below:

> "Michigan's new Constitution was not the product of hurried or partisan maneuvering, or of gradual and hidden erosion of the people's rights. The people of Michigan, by popular vote, decided to have

[9] 32 L.W. 3347.

a constitutional convention. Pursuant to that mandate, a convention was assembled. Out of that assembly's free and unfettered interchange and collision of ideas—between political scientists, practical politicians, lawyers and students of constitutional government, labor leaders, industrialists, and just plain citizens of all races and creeds—came for consideration by the entire people of Michigan a proposed constitution. The question of whether this proposed people's legislation was wise and proper was vigorously contested at the convention and during the months that followed its submission for adoption or rejection by the people. All of its provisions were exposed to the searching light of today's media of public information. Thus informed, the people of Michigan made a deliberate choice and, though the closeness of the vote portrays the vigor of the people's search for what was right, the legislation here under attack was adopted by a majority vote of the people of this State. In making this deliberate choice, every man's vote was equal to that of any other. Unless the attacked Article of the Michigan Constitution is infected with illegality, a decree, granting the relief sought by plaintiffs, would dilute and debase the vote of every elector who cast his vote with the majority. Finding no such illegality, we decline to do so.

"A canvass of the vote on the Constitution discloses that its adoption did not come about through the predominant power of any part of the State over another. It does not disclose a victory of one race or creed over another; it does not disclose a victory of Republicans over Democrats;[3] it was not a victory of the rural over the urban, or of capital over labor; neither can we discern any influences or pressures except what are traditional in American political contesting. It is true that issues other than Article IV, Sections 2-6, played a part in the

vote pattern, but the Article before us was prominent in the public discussions which preceded the voting.

"No clear picture emerges from a study of the vote except that the majority of the people of Michigan made a considered and deliberate choice. For our conclusion, we assume, as plaintiffs insist, that we, the federal judges, may have the right, under some circumstances, to tell the people of Michigan that they cannot have what they chose for themselves. We are not persuaded, however, that the 1963 choice of a Constitution by the people of Michigan was a deliberate or unwitting creation of an invidiously discriminatory plan of apportionment.

"The complaint should be dismissed."

"[3] Wayne County, Michigan, recognized now as a Democratic stronghold, usually voting on a basis of about 65% Democratic and 35% Republican, voted in the constitutional election 245,410 for and 294,629 against the Constitution. The five most populous counties, whom the plaintiffs assert are the victims of discrimination, in total voted 441,530 for and 457,294 against the Constitution. Rural counties, which are claimed to be unfairly favored by the discrimination which plaintiffs assert is in the Constitution, in many instances voted strongly against the Constitution, and it would have gone down except for the heavy favorable vote in the urban populous counties. It might be thought that this discussion of political parties should not be mentioned. The judiciary, however, should not pretend such naivete as not knowing that politics is here involved."

The Fourteenth Amendment, like the United States Senate, is a constitutional device for protecting minorities from oppressive majorities. Yet appellants urge that the Fourteenth Amendment be extended to protect Michigan's majority from itself. Specifically, appellants, in the name of majority rule, would deny the majority the right to delegate a small portion of the power it possesses to the minority in northern Michigan. That delegation, we sug-

gest, is analogous to the protection given to minorities by the United States Senate and, indeed, by the Fourteenth Amendment itself.

F. Summary

By this appeal, appellants in reality do no more than challenge the holdings of the court below: (i) that the Fourteenth Amendment does not require that every state apportion its legislature in precisely the same manner, (ii) that the Amendment does not blindly require equal population apportionment of both houses of a bicameral state legislature but leaves room for adjustment of apportionment systems to particular factual circumstances of each state, and (iii) that Michigan is a state whose particular factual circumstances justify such adjustment. If the challenge of appellants of this threefold holding is ill-founded, and we submit that it is, there is nothing of substance left in appellants' appeal and the District Court's judgment should be affirmed without more.

II. MICHIGAN'S SYSTEM OF LEGISLATIVE REPRESENTATION

Of course, the District Court also held (and appellants here also challenge the holding) that the specific adjustment chosen by the people of Michigan was constitutionally proper in the light of the specific factual characteristics of Michigan reviewed in the forepart of this motion.

As there noted, the net and only significant effect of the chosen adjustment is a shift of 4 out of 38 Senate seats to the northern half of Michigan. Appellants ignore the reasons for making this 4 seat realignment.

Instead, the attack appellants make is upon certain specifics of the Michigan formulae. Even this assault evanesces upon an examination of the distortions upon which it is based.

A. The House of Representatives

First, appellants assert that the Michigan formulae are unconstitutional because they result in minority control of both houses of the legislature (p. 5, Jurisdictional Statement). In the Michigan House a *minimum* of approximately 47.5% of the people can be represented by a majority comprised of the 56 least populated districts in the 110 member House. However, these include urban, rural, Republican and Democratic districts and therefore in practice, as opposed to theory, a majority of the state's population *must* be represented by a majority of the House on any legislation it passes.

Appellees plainly and unequivocally assert that the Michigan House of Representatives is based on population as nearly as practicable. Table 1, set forth below, was prepared from Map II A-4 set forth in Appendix III.[10] This Table, which lists in descending order by population the 21 most populous counties of Michigan (containing 82.69% of the State's population), proves that the Michigan House formula results in a straight population apportionment.

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[10] The Apportionment Commission which is charged by Article IV, Section 6 (Jurisdictional Statement Appendix, 40a-41a) with the duty of creating districts pursuant to the formulae set forth in Article IV was unable to agree upon a single plan. Therefore, the Commission presented four plans, only three of which purport to comply with Article IV, to the Michigan Supreme Court to determine which plan complies most accurately with Article IV (42a). Table I also reflects all three plans which purport to comply with Article IV, including the plan submitted by 4 of the 8-member Commission and adopted by three of the eight Justices of the Michigan Supreme Court. The remaining Justices have adopted no plan. Four have stated that they are awaiting direction from this Court. The fifth Justice has rejected all plans as violating the Fourteenth Amendment.

TABLE 1

County	% of Total Population	Theoretical Entitlement (% of Total Population x 110 seats)	Actual Seats Allocated	Cumulative Theoretical Entitlement	Cumulative Actual Seats Allocated
Wayne	34.08	37.49	37		
Oakland	8.83	9.71	10	47.20	47
Macomb	5.19	5.71	6	52.91	53
Genesee	4.78	5.26	5	58.17	58
Kent	4.64	5.10	5	63.27	63
Ingham	2.70	2.97	3	66.24	66
Saginaw	2.44	2.68	3	68.92	69
Washtenaw	2.20	2.42	2	71.34	71
Kalamazoo	2.17	2.39	2	73.73	73
Muskegon	1.92	2.11	2	75.84	75
Berrien	1.92	2.11	2	77.95	77
Calhoun	1.77	1.95	2	79.90	79
Jackson	1.69	1.86	2	81.76	81
St. Clair	1.37	1.51	2	83.27	83
Bay	1.37	1.51	2	84.78	85
Monroe	1.29	1.42	1	86.20	86
Ottawa	1.26	1.39	1	87.59	87
Lenawee	.99	1.09	1	88.68	88
Allegan	.74	.81	1	89.49	89
Marquette	.72	.79	1	90.28	90
Van Buren	.62	.68	1	90.96	91
Total	82.69				

B. The Senate

Appellants also assert the theoretical possibility of minority control by 40% of Michigan's people in the Senate because the smallest 20 of its 38 districts contain approximately 40% of Michigan's population. Because these 20

districts likewise include urban, rural, Republican and Democratic districts, this bloc represents no control at all.[11]

The foundation of sand upon which appellants rest their argument is well illustrated by comparing the facts with the concluding assertion in their Jurisdictional Statement:

> "In final analysis, though dressed up in pseudo-scientific, sophisticated garb, the present provisions have in common what all apportionment provisions not based substantially on population customarily do, namely, an attempt by some verbal rationalization to preserve the status quo." (p. 20 of Jurisdictional Statement.)

Their assertion completely ignores the shift in control of the Michigan Senate from rural to urban people that directly results from the adoption of the 1963 Constitution:

Distribution of Seats in the Senate[12]

	Urban	Rural	Total
Under old Constitution	16	18	34
Under new Constitution	22 or 23	16 or 15	38

Moreover, most of the additional strength of the urban people was gained in the five most populous counties:

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[11] It cannot be disputed that the 4 Senate seats realigned by application of the Senate formula from that resulting from a straight population apportionment are "shifted" from Democratic and Republican areas to *other* Democratic and Republican areas. Based upon traditional voting patterns, such shift would result in a probable net political change of 1 seat.

[12] Source data for these tables are derived from Appendix IV. See also finding of the District Court, majority opinion of Kaess, J., Jurisdictional Statement Appendix, p. 6a.

	Old Constitution	1963 Constitution
Wayne	7	10
Oakland	1	3
Macomb	1	2
Genesee	1	2
Kent	2	1
	12	18

(In placing the House on a straight population basis, a comparable shift in allocation of seats in the House to urban counties results from the 1963 Constitution. The Upper Peninsula loses 2 of 7, or 28%, of its seats. The upper portion of the Lower Peninsula loses 5 of 13, or 38%, of its seats. By contrast Oakland County, Michigan's second-most populated county, gains 4 seats to give it 10, an increase of 67%. Macomb County, the third largest county in terms of population, gains 3 seats to give it 6, an increase of 100%.)

C. The Area Factor

Appellants also seize upon the use of area, as such, in the Senate formula as conclusive evidence of invidious discrimination. The conscious objective of the Michigan Senate formula is the creation of Senate districts small enough in size to permit representation of the people resident therein by legislators known and accessible to them and reponsive to their special needs. The creation of such districts in the vast northern regions of Michigan is achieved by the use of the area factor which results in districts small enough to permit effective representation for

its people.[13] The area factor is the impersonal objective way to achieve the goal regarded by the people of Michigan as not only legitimate but desirable.

Area itself is *not* represented in the Michigan Senate.

The employment of a mathematical formula uniformly applicable throughout the state, such as that adopted by the Michigan Constitution, in creating legislative districts has two additional advantages: one, it prevents gerrymandering and, second, it precludes any rational criticism that legislative districts were created on a "crazy-quilt" basis.

The lengths to which appellants must go to find a basis for attacking the Senate formula is demonstrated by Appendix G to their Jurisdictional Statement and their assertion that citizens in a multi-county senatorial district are denied equal treatment with all other voters within their district (p. 11, Jurisdictional Statement). These arguments are based on premises which are plainly *false*, namely that each county in a multi-county district separately elects a *fraction of a senator*. This is utter fantasy because the Senate formula requires the grouping of counties into single member districts. Once the districts are created, each person within that district will cast one vote of equal weight to that of all other voters within his district, regardless of the county in which he resides.

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[13] Other possible approaches would have been to set specific limits on the linear dimensions of districts or to draw specific boundary lines. The area factor in the Senate formula reflects linear dimensions, of course, but avoids distortion which might otherwise result from irregular coastlines. It also reflects future shifts in population thereby avoiding many of the problems created by frozen districts. The approach chosen by Michigan was a detailed mathematical formula applying to all of Michigan as opposed to either a linear definition of districts or a broad grant of discretion to an apportioning body.

Footnotes 5 and 8 on pages 8 and 9 of appellants' Jurisdictional Statement are simply mathematical extensions of the same false premise, i.e., the "fractional senator." They purport to compare the relative weight of votes in the Michigan Senate given the people of the largest and smallest counties (Wayne and Keweenaw) of Michigan. The County of Keweenaw elects no senator and no fraction of a senator. The County of Keweenaw under the Michigan formula becomes a part of a much larger district, the total population of which will contain approximately 100,000 people, and the "index of representation" for which will be approximately 211, not 693 as represented by appellants.

Moreover, the people of the County of Keweenaw simply will not elect 3.36 senators per 100,000 persons. Together with the people in every other county in that 100,000 population district, they will elect one senator. Likewise, the relative representation between each of the ten Senate districts which comprise Wayne County and the district of which Keweenaw County is a part is 2.73 to 1.00, not 8.62 to 1.00 as appellants would infer.

The motive for appellants' mathematical gyrations is obvious. Such distorted figures could obscure the fact that the *only significant result* of the application of the Michigan formulae is to "shift" 4 seats in the 38 seat Senate and thereby divert this Court from the issue in this case—Is that four seat shift, in Michigan, invidiously discriminatory?

CONCLUSION

The rationale of Michigan's system of legislative apportionment—as opposed to *per capita* apportionment for both houses—is that the Michigan formula gives control of both houses to the urban majority and yet preserves reasonably effective representation in the Senate to people residing in

more than one-half of the state, whereas *per capita* apportionment of the Senate in practical effect would disenfranchise such people. This objective is legitimate. It is a policy which, in the words of Mr. Justice Brandeis, "an informed, intelligent, just-minded, civilized man could rationally favor". (*Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 406 (dissent))

It is the Michigan formula which is rational and reasonable and it is *per capita* apportionment of the Senate which is irrational and unreasonably discriminatory if applied to the State of Michigan.

RELIEF

Wherefore, appellees, Frank D. Beadle, John W. Fitzgerald and Paul C. Younger, renew their prayer that the final judgment of the District Court in the above entitled cause be affirmed.

Respectfully submitted,

EDMUND E. SHEPHERD,
700 American Bank and Trust Building,
Lansing, Michigan;

R. WILLIAM ROGERS,
800 First National Building,
Detroit, Michigan 48226,
Counsel for Appellees, Frank D. Beadle, John W. Fitzgerald and Paul C. Younger.

FRED W. FREEMAN,
PATRICK J. LEDWIDGE,
GEORGE B. MARTIN,
Of Counsel.

Appendix I

SENATORS MAP II B-1

SENATE THEORETICAL "STRAIGHT POPULATION" AS NEARLY AS PRACTICABLE

The attached map shows an apportionment of the Michigan Senate following county lines based on the following:

1. The ratio of representation for the state is 205,895 people (7,824,018)

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   (38)

2. Each county is entitled to one senator for each full ratio of representation (205,895 people) and an additional senator for a major fraction of representation (102,948 or 50 percent of 205,895). The same result would be obtained by organizing areas having as nearly as may be a full ratio and then allocating the additional seats on the basis of population by the method of equal proportions.

3. Each county having less than a full ratio of representation is joined with another county or counties in order to achieve as near as may be possible a full ratio of representation.

Map II B-1



Appendix I

SENATORS MAP II B-1

Senate Theoretical Straight Population As Nearly As Practicable

Dist.	No. of Senators	Average Population Per Senator	Deviation from Average 205,895 Amount	Percent	Average Land Area Per Senator in Sq. Mi.
1	13	205,133	-762	.4	46.6
2	3	230,201	24,306	11.8	292
3	2	202,902	-2,993	1.5	241
4	2	187,157	-18,738	9.1	322
5	2	181,594	-24,281	11.8	431
6	1	211,296	5,401	2.6	559
7	1	213,651	7,756	3.8	1,917
8	1	205,499	-396	.2	1,764
9	1	186,797	-19,098	9.3	1,068
10	1	212,044	6,148	3.0	1,075
11	1	224,810	18,915	9.2	1,847
12	1	210,673	4,778	2.3	1,287
13	1	215,447	9,552	4.6	3,180
14	1	211,657	5,762	2.8	2,150
15	1	190,752	-15,143	14.3	812
16	1	199,570	-6,325	3.1	2,961
17	1	204,843	-1,052	.5	2,000
18	1	211,701	5,806	2.8	2,460
19	1	206,370	475	.2	8,983
20	1	206,864	969	.5	10,835
21	1	211,398	5,503	2.7	10,651

Appendix II

SENATORS MAP II B-2

SENATE PURSUANT TO ARTICLE IV SECTION 2— AS CLOSE AS POSSIBLE TO 13 FACTORS

The 78 counties having less than 13 factors are arranged into districts having as nearly as possible 13 apportionment factors. All districts are contiguous by land without crossing the straits.

The minimum percent of the state's population represented by a majority of the members would be 41.26 (assuming all districts within a county are of equal population).

Map II B-2



Appendix II

SENATORS MAP II B-2

SENATE—AS CLOSE AS POSSIBLE TO 13 FACTORS

Dist.	No. of Senators	No. of Factors	Average Population Per Senator	Deviation from Average Population Per Senator (205,895) Amount	Per Cent	Average Land Area Per Senator in Sq. Mi.
1	10	137.38	266,674	60,779	29.52	60.7
2	3	36.86	230,201	24,306	11.81	292
3	2	21.60	202,902	−2,993	1.45	241
4	2	20.25	187,157	−18,738	9.10	322
5	1	20.07	363,187	157,292	76.39	431
6	1	11.78	211,296	5,401	2.62	559
7	1	14.24	213,651	7,756	3.76	1,917
8	1	14.06	216,093	10,198	4.95	1,723
9	1	11.44	186,797	−19,098	9.28	1,068
10	1	13.21	218,107	12,212	5.93	1,174
11	1	11.55	181,678	−24,217	11.76	1,272
12	1	13.02	210,673	4,778	2.32	1,287
13	1	13.42	181,441	−24,454	11.88	2,358
14	1	13.05	184,353	−21,542	10.46	2,084
15	1	14.05	227,764	21,869	10.62	1,378
16	1	12.93	170,342	−35,553	17.30	2,398
17	1	13.04	188,186	−17,709	8.60	1,942
18	1	13.16	143,860	−62,035	30.13	3,311
19	1	13.08	190,650	−15,245	7.40	1,897
20	1	11.72	115,420	−90,475	43.94	3,315
21	1	12.82	85,136	−120,759	58.65	4,820
22	1	12.60	91,941	−113,954	55.35	4,508
23	1	15.16	94,586	−111,309	54.06	5,887
24	1	14.86	110,626	−95,269	46.27	5,232
25	1	14.71	100,772	−105,123	51.06	5,419

Appendix III

SENATORS MAP II A-4

HOUSE ON POPULATION, PURSUANT TO ARTICLE IV, SECTION 3

(.7% single-county; .91 multi-county; and equal proportions)

Each county containing .7 of one per cent of the state's population and each group of counties containing as nearly as may be a full ratio of representation of 71,127 people (.91%) is made a representative area and allocated one seat. There are 39 representative areas. The remaining 71 seats are allocated on the basis of population by the method of equal proportions. All districts are contiguous by land without crossing the straits.

The minimum per cent of the state's population represented by a majority of the members would be 47.75 (assuming all districts within a county are of equal population).

Map II A-4


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Appendix III

SENATORS MAP II A-4

House on Population Pursuant to Article IV, Section 3
(.7% single-county; .91 multi-county; and
equal proportions)

Rep. Area No.	No. of Seats	Average Population Per Seat	% of Total Population Per Seat	Average Deviation from Ratio of Repres. (71,427) Amount	Per Cent
1	37	72,074	.92	947	1.3
2	10	69,060	.88	-2,067	2.9
3	6	67,634	.87	-3,493	4.9
4	5	74,863	.96	3,736	5.3
20	5	72,637	.93	1,510	2.1
23	3	70,432	.90	-695	1.0
8	3	63,584	.81	-7,543	10.6
29	2	86,220	1.10	15,093	21.2
26	2	84,856	1.09	13,729	19.3
18	2	74,971	.96	3,844	5.4
34	2	74,932	.96	3,805	5.3
27	2	69,429	.89	-1,698	2.4
28	2	65,997	.85	-5,130	7.2
6	2	53,600	.69	-17,527	24.6
9	2	53,521	.69	-17,606	24.8
		57,729	.74	-13,398	18.8
25	2	48,395	.62	-22,732	32.0
30	1	101,120	1.29	29,993	42.2
19	1	98,719	1.26	27,592	38.8
22	1	91,679	1.17	20,552	28.9
31	1	77,789	.99	6,662	9.4
32	1	69,645	.89	-1,482	2.1
33	1	79,264	1.01	8,137	11.4
5	1	74,240	.95	3,113	4.4
7	1	77,311	.98	6,184	8.7
24	1	81,422	1.05	10,295	14.5
21	1	81,101	1.04	9,974	14.0
16	1	70,441	.90	-686	1.0
17	1	72,360	.92	1,233	1.7
10	1	62,219	.80	-8,908	12.5
15	1	67,974	.87	-3,153	4.4
14	1	69,687	.89	-1,440	2.0
13	1	68,866	.89	-2,261	3.2
11	1	70,953	.90	-174	0.2
12	1	67,371	.86	-3,756	5.3
[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]

(Equal proportions)

Rep. Area No.	No. of Seats	Average Population Per Seat	% of Total Population Per Seat	Average Deviation from Ratio of Repres. (71,127)	
				Amount	Per Cent
1	37	72,074	.92	947	1.3
2	10	69,060	.88	-2,067	2.9
3	6	67,634	.87	-3,493	4.9
4	5	74,863	.96	3,736	5.3
20	5	72,637	.93	1,510	2.1
23	3	70,432	.90	-695	1.0
8	3	63,584	.81	-7,543	10.6
29	2	86,220	1.10	15,093	21.2
26	2	84,856	1.09	13,729	19.3
18	2	74,971	.96	3,844	5.4
34	2	74,932	.96	3,805	5.3
27	2	69,429	.89	-1,698	2.4
28	2	65,997	.85	-5,130	7.2
6	2	53,600	.69	-17,527	24.6
9	2	53,521	.69	-17,606	24.8
		57,729	.74	-13,398	18.8
25	2	48,395	.62	-22,732	32.0
30	1	101,120	1.29	29,993	42.2
19	1	98,719	1.26	27,592	38.8
22	1	91,679	1.17	20,552	28.9
31	1	77,789	.99	6,662	9.4
32	1	69,645	.89	-1,482	2.1
33	1	79,264	1.01	8,137	11.4
5	1	74,240	.95	3,113	4.4
7	1	77,311	.98	6,184	8.7
24	1	81,422	1.05	10,295	14.5
21	1	81,101	1.04	9,974	14.0
16	1	70,441	.90	-686	1.0
17	1	72,360	.92	1,233	1.7
10	1	62,219	.80	-8,908	12.5
15	1	67,974	.87	-3.153	4.4
14	1	69,687	.89	-1,440	2.0
13	1	68,866	.89	-2,261	3.2
11	1	70,953	.90	-174	0.2
12	1	67,371	.86	-3,756	5.3
35	1	60,585	.78	-10,542	14.8
36	1	67,968	.87	-3,159	4.4
37	1	56,154	.72	-14,973	21.1
38	1	65,471	.84	-5,656	8.0
39	1	55,806	.72	-15,321	21.5

APPENDIX IV

CONTROL BY URBAN PEOPLE OF SENATE APPORTIONED PURSUANT TO (i) ARTICLE IV, SECTION 2 AND (ii) "STRAIGHT POPULATION AS NEAR AS PRACTICABLE"

Using "Urbanized Area" People of Michigan 1960 U. S. Census of Population—Michigan PC(1)-24A pp. 26-27

Urbanized Area	Map	District Population	Urbanized Population	Urbanized Control	Seats Controlled Pursuant to Article IV, Section 2 Map II B-2	Seats Controlled Pursuant to "Straight Population as near as practicable" Map II B-1
I. Ann Arbor	1) II B-1 and II B-2	210,673	115,282	yes	1	1
II. Bay City	1) II B-2	184,353	72,763	no		
	2) II B-1	211,657	72,763	no		
III. Detroit						
Wayne County	II B-1 and II B-2	2,666,297*	2,599,295	yes	10[a]	13[e]
Oakland County	II B-1 and II B-2	690,259*	590,621	yes	3[b]	2[b]
Macomb County	II B-1 and II B-2	405,804*	346,456	yes	2[c]	2[c]
IV. Flint	II B-1 and II B-2	374,313*	277,786	yes	1[d]	1[d]

[a] Since the population per Senator in Wayne County is 266,629, the 67,002 rural people will not control any of the 10 seats.

[b] Since the population per Senator in Oakland County is 230,086, the 99,638 rural people will not control any of the 3 seats.

[c] Since the population per Senator in Macomb County is 202,901, the 59,345 rural people will not control either of the 2 seats.

[d] Since the population per Senator in Genesee County is 187,157, the 96,527 rural people can control one of two seats if *all* the rural people are placed in one district.

[e] Since the population per Senator in Wayne County under "straight population as near as practicable" would be 205,099, the 67,002 rural people would not control any one of the 13 seats.

*In all multi-district counties under Article IV, Section 2, the total population of the county is shown.

Appendix IV

Urbanized Area	Map	District Population	Urbanized Population	Urbanized Control	Seats Controlled Pursuant to Article IV, Section 2 Map II B-2	Seats Controlled Pursuant to "Straight Population as near as practicable" Map II B-1
V. Grand Rapids	II B-1 and II B-2	363,187	290,692	yes	1	2[f]
VI. Jackson	1) II B-1	224,810	71,412	no		
	2) II B-2	181,678	71,412	no		
VII. Kalamazoo	1) II B-1	212,044	115,659	yes	1	1
	2) II B-2	218,107	115,659	yes		
VIII. Lansing	II B-1 and II B-2	211,296	164,238	yes	1	1
IX. Muskegon	1) II B-1	211,701	95,350	no	1	
	2) II B-2	190,650	95,350	yes		
X. Saginaw	1) II B-1	190,752	129,215	yes	1	1
	2) II B-2	227,764	129,215	yes		
				Total	22 (perhaps 23)	25 (perhaps 26)

Urban People % of Population	Theoretical Seats (% of Population x 38 Seats)	Article IV, Section 2			"Straight Population"		
62.6	23.78	Total Senate	38	38	Total Senate	38	38
		Urban	22	23	Urban	25	26
		Rural	16	15	Rural	13	12

[f] Since the population per Senator in Kent County under "straight population as near as practicable" would be 181,591, the 68,957 rural people would not control either of the 2 seats.

Appendix V

EXCERPT FROM CONSTITUTION OF 1963

ARTICLE XII

Amendment by legislative proposal and vote of electors. Section 1. Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to by two-thirds of the members elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the next general election or special election as the legislature shall direct. If a majority of electors voting on a proposed amendment approve the same, it shall become part of the constitution and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved.

Amendment by petition and vote of electors. Sec. 2. Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Submission of proposal; publication. Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provi-

sions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

Ballot, statement of purpose. The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

Approval of proposal, effective date; conflicting amendments. If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

General revision of constitution; submission of question, convention delegates and meeting. Sec. 3. At the general election to be held in the year 1978, and in each 16th year thereafter and at such time as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.

Appendix V

Convention officers, rules, membership, personnel, publications. The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such officers, employees and assistants as it deems necessary and to fix their compensation; to provide for the printing and distribution of its documents, journals and proceedings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.

Submission of proposed constitution or amendment. No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS, **Appellants,** **vs** **JAMES M. HARE, Secretary of State of the State of Michigan,** **and** **FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan,** **and** **STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,** **Appellees.**	**No. 962**

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

STANTON S. FAVILLE
Chief Assistant Attorney General of the State of Michigan, In Pro Per
JAMES R. RAMSEY
Assistant Attorney General
RUSSELL A. SEARL
Assistant Attorney General
Attorneys for Stanton S. Faville, Chief Assistant Attorney General of the State of Michigan, Intervening Defendant.

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In The

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WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS, **Appellants,** vs **JAMES M. HARE, Secretary of State of the State of Michigan,** and **FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan,** and **STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,** **Appellees.**	No. 962

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Intervenor Faville moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment dismissing on the merits plaintiffs' complaint which sought a determination that Article IV, sections 2-6 of the Constitution of the State of Michigan violates the 14th Amendment.

This Constitution was the product of the Constitutional Convention consisting of 144 delegates elected by the people of Michigan at an election held April 1, 1961. The convention convened October 3, 1961 and adjourned sine die August 1, 1962. The product of its work was accepted by the people at an election held April 1, 1963.

The challenged portion of the Michigan Constitution is contained in plaintiffs' jurisdictional statements Appendix D. With these provisions should be considered the provision for amendment and revision contained in Article XII, which we attach as our Appendix A.

The provisions for the Michigan legislature rather simply stated are:

1. The House of Representatives based upon population;

2. The Senate based upon area and population;

3. A districting of the State of Michigan after each decennial census by an apportionment commission consisting of four members from each of the major political parties existing in the state selected by the state organization of the parties with equal representation from each party;

4. A selection of a plan which complies most accurately with the constitutional requirements by a nonpartisan

elected Supreme Court if the politically selected apportionment commission fails to agree;

5. The preservation in the people of the power of revision or amendment of any provision of the Constitution.

The House of Representatives consists of 110 members elected for two years from single member districts apportioned on population. Each county containing .7 of 1% of the population of the State constitutes a separate representative area. Other counties are combined to form representative areas having not less than .7 of 1% of the population of the State. After the representative areas are formed, each is assigned one representative and the remainder of 110 representatives are distributed by applying the method of equal proportions.

The Senate of 38 members is elected from single member districts having terms of four years coinciding with the term of the Governor.

In districting for the Senate after each decennial census, each county is assigned apportionment factors equal to the sum of its percentage of the State's population computed to the nearest one-one hundredth of 1% multiplied by four and its percentage of the State's land area computed to the nearest one-one hundredth of 1%. Counties having 13[1] or more apportionment factors are placed in one class. Collectively they receive the number of senators as their total factors bear to the total number of factors. Each county in this class is assigned a senator, the balance being distributed by utilizing the method of equal proportions applied to apportionment factors.

---

[1]

The figure 13 is obtained by dividing total State factors (400 population, plus area 100, total 500) by the number of senators (38).

The counties having less than 13 apportionment factors are arranged into senatorial districts that are compact, convenient, contiguous by land, as rectangular in shape as possible, and having as nearly as possible 13 apportionment factors, but in no event less than 10 nor more than 16. Insofar as possible existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards.

In both the Senate and the House of Representatives, the counties having more than one legislator are divided into single senatorial or representative districts as the case may be, having population as nearly equal as may be but not less than 75% nor more than 125% of the number determined by dividing the population of the representative area by the number of legislators to which it is entitled. These districts are to follow city and township boundaries where applicable and shall be composed of compact and contiguous territory as nearly uniform or square in shape as possible.

The apportioning under these rules is to be done by a commission of eight commissioners who are selected on the basis of one from each of four designated regions of the state by the state organization Committee of each of the two political parties whose candidates for Governor received the highest vote at the last general election at which the Governor was elected preceding the apportionment.

The commission is supposed to district the State in accordance with the constitutional requirements. Should there be a failure to agree, each member individually or jointly with other members may submit a proposed plan to the Supreme Court which has the duty of selecting the plan which complies most accurately with constitutional requirements.[2]

---

[2]

While not involved in this case, it may be worthy of note that the

The constitutional provisions were challenged by the plaintiff as being in violation of the 14th Amendment of the Constitution. No definitive plan has been adopted in Michigan so plaintiffs' challenge is on the basis that a plan cannot be drafted which will stand the test. The three judge district court after a hearing on the merits, at which no oral testimony was taken, upheld the constitutional provisions by a two-to-one vote.

ARGUMENT

EQUAL PROTECTION IN LEGISLATIVE APPORTIONMENT

Since any apportionment not based strictly upon population will produce variations in the number of persons represented by a legislator, it becomes pertinent to inquire whether the provisions which produce the variance have any substantial relationship to legitimate government objectives which are to be achieved by the apportionment. Phrased another way: What is the function of the legislature in a representative government?

> "The sovereign power of the state includes protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public."

---

commission has failed to agree, four plans have been submitted to the Supreme Court of Michigan and as yet no decision has been made. The Justices, however, released opinions, the first series being dated March 5, 1964, published in 372 Mich 418 (advance sheet part 4). The second series, released April 10, 1964, while not as yet published will, we are advised, be published at approximately the time this brief is filed. They will appear in Volume 372 Mich 461, et seq. (advance sheet part 5).

Cady v. City of Detroit, 289 Mich 499.

Followed in:

Peters v. Michigan State College, 320 Mich 243, 249;

Tower Realty, Inc. v. City of East Detroit, 196 F 2d 710.

See also:

New York City Housing Authority v. Muller, 270 NY 333;

United States v. Douglas-Willan Sartoris Co., 3 Wyo 287

We consider the following legal principles to be established:

1. "The exercise of the inherent police power of the state is vested in the legislative department." *People v. Piasecki*, 333 Mich 122.

2. "Tax exactions, property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law." *In re Dodge Brothers*, 241 Mich 665; *Garavaglia v. Department of Revenue*, 338 Mich 467.

3. "The power of eminent domain is inherent in state sovereignty. (citations omitted). Subject to constitutional restrictions, it is entirely under control of the legislature." *In re Petition of City of Detroit*, 308 Mich 480, 484.

There is a wide diversification between the counties of Michigan of such things as manufacturing, agriculture, the growing of fruits and crops, trades and occupations, geog-

raphy and demography, and similar items in which there is a localized interest.

To the end that legitimate objectives of government may be exercised by a legislature composed of members selected from districts in which interests are diverse and sometimes conflicting, we believe that the people may adopt a form of government which they conceive to be best suited for these purposes and which reasonably attains these ends.

THE PROVISIONS OF THE MICHIGAN CONSTITUTION FOR A LEGISLATURE PRESENT A REASONABLE PLAN FOR THE GOVERNMENT OF A FREE PEOPLE.

The people of Michigan in an election selected a new constitution for their self-government. The provisions of the constitution relating to the legislature were not intended by them as a model to be breathlessly awaited by others. They were simply tailored by the people of Michigan to meet the peculiar legislative needs of the people of Michigan in the orderly process of constitutional self-government.

We do not contend that the provisions of the Michigan constitution would be justified, say in Rhode Island or Delaware, nor, in fact, in any other state. Our position is that in Michigan these provisions are so reasonable and proper that they meet the standards set out by the Fourteenth Amendment.

The plan for the legislature consists of:

1. A House of Representatives based upon population;

2. A Senate based upon area and population;

3. A districting of the state after each decennial census by an apportionment commission consisting of four members from each of the major political parties existing in the state, selected by the state organizations of the parties, with equal representation for each party;

4. A selection of the plan which complies most accurately with the constitutional requirements by a non-partisan elected Supreme Court if the politically oriented apportionment commission fails to agree;

5. The reservation in the people of the power of revision or amendment of any provision of the constitution.

Intervening Senators' Exhibit IIA 4 Appendix III—included in the appendix of their motion to affirm shows that the House of Representatives may be districted on population. We have compiled a table, which is attached as Appendix B, listing 18 counties of the state in descending order of population. An examination of this appendix will demonstrate that each county on the list has the exact number of representatives to which it is entitled by population. In addition, the cumulative population entitlement of all of the counties is met as nearly as may be by their exact number of representatives through the eighth county and until the county of Kalamazoo (ninth county) is reached. From this point there is a disparity of one between the cumulative entitlement and actual number of representatives, until the county of St. Clair (fourteenth county) is reached, when the cumulative entitlement and exact number is again in balance.

Stopping here at the point where no county is entitled to more than one representative (after Bay County), we find that these larger counties entitled to two or more representatives are entitled in combination to 84.78 seats and that

they have 85 seats leaving the remaining 25 house seats to be distributed among the 68 smaller counties of the state of which 19 seats will ultimately be distributed among 62 counties.[3]

People, by count, are quite adequately and fairly represented in the House of Representatives.

The Senate portion of the Michigan plan for Michigan need is based upon the number of people along with area Michigan's upper peninsula contains less than 1/19 of the people of Michigan. It now appears that the entire upper peninsula must be joined with the eight counties in the two northerly tiers of counties in the lower peninsula in order to equalize the population among the 19 Michigan congressional districts.[4]

In the upper peninsula alone the distances are tremendous. Laying the upper peninsula city of Sault Ste. Marie at Detroit, the westernmost boundary of the upper peninsula would extend almost to Chicago, Illinois. Laying Menominee (in the upper peninsula) at the intersection of the

---

[3]

It is a fact that four plans were presented by members of the Apportionment Commission to the Supreme Court for its selection of the one most accurately complying with the provisions of the Constitution. Three of these plans followed the constitutional House of Representative requirement of 7/10 and county lines. In each of these plans the actual number of representatives allotted to the counties on the table (Appendix B) was identical with the table.

[4]

A proposed plan for the congressional districting of Michigan containing this provision was recently presented by the Governor of the State to the legislature following the decision in the case of Calkins v. Hare, determined in the United States District Court for the Eastern District of Michigan on March 27, 1964.

northerly Ohio line and US-127, the tip of the Keweenaw peninsula will extend northerly beyond Clare, Michigan.

To use another illustration: The westernmost point in the upper peninsula is on approximately the 90° meridian, while the easternmost tip is on the 84° meridian. If we drop south to the 40th parallel, these two meridians intersect close to Springfield, Illinois, on the west and Dayton, Ohio on the east. On the 36th parallel, the intersection is close to Knoxville, Tennessee on the east and is west of the Mississippi River on the west. We realize in dropping down to another degree of latitude, the distances become greater but we are certain that the court will make proper allowances for this.

While the distances are great, the means of travel are limited. With the sparsity of population in this area, the roads are not numerous, nor are the railroads and air travel between upper peninsula points is mostly by circuitous routes. Yet the people living in this area and their legitimate problems must be joined with those of the northerly two tiers of counties in the lower peninsula of Michigan to obtain two state senators on a strict population basis. The combined area of these two senatorial districts is 36.71% of the entire state.

Going one step further and creating another senatorial district, we find that a line extending along the lower line of the counties of Mason, Lake, Osceola, Clare and Gladwin, and excluding the counties of Lake and Arenac, would be the southern boundary of a third possible senatorial district. We have now covered half of the area of the state, 52.44% to be exact.[5]

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[5] The figures used in this compilation are taken from plaintiff's Exhibit D which was attached to his bill of complaint.

The area in these three senatorial districts supports many space demanding pursuits, such as lumbering, mining and recreation of numerous kinds. These are all legitimate, proper subjects of legislative action both in regulation under the police power and by fostering their lawful pursuits. In general, the people of this portion of the state are not so prosperous as are the people located in other portions of the state where fortune has been kinder. Their welfare, which is a legitimate subject for legislative action, may be improved properly through legislative action.

During the recent argument of the case of *Lucas v. 44th General Assembly of the State of Colorado*, Mr. Justice White observed:

> "Certainly, no matter how you slice up the state, everybody will be represented."

Mr. Zarlengo replied:

> "However, if you apportion both Houses on a strict population basis, the interest of certain areas will not be represented at all."

Mr. Justice White then replied:

> "Your real point is not representation, but effective representation."

The Chief Justice also observed:

> "Isn't the basic issue whether these appellants and all other people in the state of Colorado have proper representation, whether they are city people or farmers, liberals or conservatives, or whatever?"

Mr. Justice Goldberg inquired:

> "Why is it assumed that if both Houses were on a population basis, and the urban majority had a majority in both houses, it would be less solicitous of the people as a whole than the rural minority?
>
> "What I don't follow is the argument that the need to safeguard the interest of the rural areas, but not urban, justifies discrimination in weighting the votes."

In one sense, to represent is to serve for another. People speak of their "representative" in a legislative body, knowing that he is there to serve the constituency from which he was elected. Historically and factually, this has been the relationship between the people and the members of the legislative branch of state government. There is no independence of local affairs in the function of a legislature.

The Chief Justice of the Michigan Supreme Court in writing the opinion in the case of *The People ex rel. Royce v. Goodwin*, 22 Mich. 496, recognized the distinction between the legislative and judicial branches when he said:

> "Judges differ from all other public servants in having no representative duties. The judicial department of every civilized government is one of the three coordinate parts of the sovereignty which acts for the state in expounding the laws and enactments in which the other departments have acted for the people as legislators and the approvers of legislation. It represents only the law by which the people have, by their proper agents, bound themselves."
>
> (p. 499)

Willingness to serve and ability to perform are not the sole criteria for testing adequate representation. If legislative representation is to be effective and meaningful there must be a link of responsibility to the "people back home." It is a demonstrable axiom that opportunity for direct communication by the people with their state representative lessens as population decreases and area increases. Any representative of an urban center can readily ascertain the views and needs of his constituents by reading the daily metropolitan press, by radio, by public assembly and by personal interview. But these media of communication weaken perceptibly in rural districts where distances are great, where there is no local daily paper, where there is no focal point for public assembly, and where personal interview occurs on the farm or at the rural store. Where representation is based on population the number of representatives are obviously greater to serve the compacted populace of a metropolitan area. These conditions make for effective representation. But unless an adjustment is made, representation based on population in thinly settled rural areas may become so dissipated as to be ineffectual and totally without vitality. Good representation makes for good government. To obtain good representation it is necessary that there be a reasonable opportunity to communicate between the people and their representative and a reasonable plan of representation which assigns an adequate number of legislative seats to all areas of a state in order that the views and needs of the people can be readily ascertained.

Keeping of legislative districts at a size sufficiently small to permit a legislator, through communication with his constituents or otherwise, to keep familiar with particular interests and problems of his district is essential to effective representation. The lack of such familiarity cannot be supplied or replaced by a sympathetic attitude upon the part of a legislative body. Unless a legislator can be kept

cognizant of the needs of his own district so as to be able to initiate required legislation, there is necessarily a lack of effective representation.

We believe that the weighting of votes in one house of the legislature as provided in Michigan's new constitution is necessary to give to the people of this area covering all of the upper peninsula and a portion of the lower peninsula the effective representation to which they are entitled and on balance cannot be said to discriminate invidiously against anyone or any section.

The balance of the plan is aimed at the prevention of political maneuver by a body which may be more interested in preserving the status quo than in a fair districting. Quite strict rules are set forth in the constitution to enable the apportionment commission to develop a fair plan of districting. Selecting the members of the commission from the two political parties now dominant in the state has for its purpose the insuring that districting will not be done for the advantage or disadvantage of one political party or the other. It is well adapted to meet that end if the members of the commission have for their objective—good government and fair treatment.

However, should the politicians on the apportionment commission engage in political dallying, the non-partisan elected Supreme Court has been selected by the people as their last best hope of getting the machinery of government off dead center. If all these fail through initiatory processes the people of Michigan have sufficient control by amending the Constitution to insure that a representative government will be continued.

Such is the plan. We submit that it contains nothing invidious but is a proper, reasonable plan for the legislative branch of the government of Michigan.

THE SENATE

The Michigan Senate, viewed alone, presents no case of invidious discrimination. While we believe that the provisions relating to the composition of the legislature should be considered as a whole in making a determination on their reasonableness, the Senate provisions, standing alone, are defensible. The provisions set forth in Article IV, section 2 of the Michigan Constitution of 1963, have been misinterpreted by the appellants who choose to disregard the familiar rule that if two constructions are possible that which will sustain the constitutionality must be selected. The appellants chose to select as of prime importance the sentence: "Insofar as possible, existing senatorial districts at the time of reapportionment shall not be altered unless there is a failure to comply with the above standards."

By taking this as the first mandate to the apportionment commission, appellants seek to bring the case within the decision of *Scholle v. Hare*, 367 Mich 176, and render the plan unconstitutional on the basis of that decision. The sentence selected is enumerated last of all the standards set in the Constitution for senatorial districts. In addition to this, it was the subject of explanation by Dr. John A. Hannah, who served the Constitutional Convention as chairman of the Committee on Legislative Organization. Dr. Hannah said:

> "Just one final point. The point that Dr. Pollock makes against this proposal as a weakness I think is its strength. I think that it isn't in the best interests of the people of the state to redistrict just for the exercise of redistricting. People become accustomed to being a part of a senatorial district. If you elect a senator from a senatorial district, if population changes

dictate that there is sufficient inequity to warrant it, then of course whatever districting is required should be engaged in. But unless you put in the proviso that you stick to the present districts insofar as possible, so far as they meet the formula requirements, then you face the possibility that a whimsical apportionment commission, just for the exercise of doing something, can totally disregard what you have and draw totally new districts, make a great many counties come into different districts than they need to come into, unseat senators that need not be unseated."

Constitutional Convention
1961, Official Record, Vol II,
page 2094

Similarly, evil is sought to be made out of the not less than 75% nor more than 125% provision, which appears in both the Senate and House of Representatives sections of the Constitution and relates to the division of counties into districts. The argument here likewise disregards the plain requirement of the Constitutional language. Dr. John A. Hannah, addressing the convention on this point, stated:

"Mr. Chairman and members of the committee, I would remind you that when we began consideration of this proposal there were 2 committee amendments adopted and one of them was adopted to line 23 when the words were inserted 'of any district shall be . . .' and the new words 'as nearly equal as possible but not less than 75 per cent nor more than 125 per cent . . .' All previous comments to the contrary, the committee started with the conviction that these districts within the county should be as nearly equal as possible. And then it consulted with election officials in the various counties, middle sized counties and particularly Wayne

county, and they emphasized over and over again the importance of putting into this constitution provisions that made it possible to come up with representative and congressional districts that would fit into the usual and logical patterns used in conducting elections.

"The committee very carefully went into this and started with the notion that limitation should be as nearly 100 as possible. Ideally every district in Wayne county would be identical. Actually, as you will note from your green book, at the moment—you are talking about senatorial districts in Wayne County—at the moment, they run from 246,000 to 647,000 people, with some districts almost 3 times as large as others. Obviously that is undesirable. The same thing is true in Kent county, where the 2 present districts are quite different in size. That is why there is in the proposal that you have already approved, Committee Proposal 79, the requirement that all of the counties with more than one senatorial district be redistricted by the reapportionment commission, in accordance with the formula.

"The committee faced the same necessity that you face: how closely can you do it and still come up with something that is practical, and on the advice of the election people, looking at the actual tract figures, with the population shown for every census tract, it became obvious that to be practical and to stay with city and township and the usual lines, about 75 to 125—you are going to do pretty well if they stay within those limits. But that doesn't mean they shall vary that far, because you have already put in the language so that 'the population of any district shall be as nearly equal as possible but not less than 75 per cent nor more than

125. . . .' If they can make it 100 per cent exactly, that is what they should do."

Constitutional Convention 1961,
Official Record, Vol II, page 2116.

The reasoning that applied to 75—125 dictated the 10—16 tolerance in the number of factors allowed in senatorial districts consisting of more than one county. Delegate William F. Hanna said:

"Mr. Chairman, Mr. Downs, the figure 10 or more than 16 was an attempt to apply to the 13 apportionment factors the same rationale that is applied in the third paragraph of section a and the first numbered paragraph of section b: 75 per cent of 13 is 9.75, computed to the nearest apportionment factor, is 10 points; 125 per cent of 13 apportionment factors, computed to the nearest apportionment fact, is 16. This is the way it was arrived at."

Constitutional Convention 1961,
Official Record, Vol II, page 2104.

These provisions therefore have for their purpose the attainment of a feasible apportionment plan, together with placing reasonable restrictions on the power of the apportionment commission to deviate from the norm of strict quality. The provisions for the Senate set guidelines for a body based on a formula which by balancing area and population allows effective representation for all of the people. The built in formula controls senatorial representation under future population trends and prevents gerrymandering.

CONCLUSION

We respectfully submit that the plaintiffs appeal presents no information warranting plenary review by this court. The judgment of the three-judge District Court should be affirmed.

Respectfully submitted,

STANTON S. FAVILLE
Chief Assistant Attorney General
of the State of Michigan, In Pro Per

JAMES R. RAMSEY
Assistant Attorney General

RUSSELL A. SEARL
Assistant Attorney General

Attorneys for Stanton S. Faville, Chief Assistant Attorney General of the State of Michigan, Intervening Defendant.

The Capitol

Lansing, Michigan 48910

APPENDICES

APPENDIX A

ARTICLE XII

Amendment and Revision

Amendment by legislative proposal and vote of electors.

Sec. 1. Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to by two-thirds of the members elected to and serving in each house on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the next general election or special election as the legislature shall direct. If a majority of electors voting on a proposed amendment approve the same, it shall become part of the constitution and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved.

Amendment by petition and vote of electors.

Sec. 2. Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and

circulated in such a manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Submission of proposal; publication.

Any amendment proposed by such petition shall be submitted, not less than 120 days after it was filed, to the electors at the next general election. Such proposed amendment, existing provisions of the constitution which would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law. Copies of such publication shall be posted in each polling place and furnished to news media as provided by law.

Ballot, statement of purpose.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption. Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

Approval of proposal, effective date; conflicting amendments.

If the proposed amendment is approved by a majority of the electors voting on the question, it shall become part

of the constitution, and shall abrogate or amend existing provisions of the constitution at the end of 45 days after the date of the election at which it was approved. If two or more amendments approved by the electors at the same election conflict, that amendment receiving the highest affirmative vote shall prevail.

General revision of constitution; submission of question, convention delegates and meeting.

Sec. 3. At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved, the electors of each representative district as then organized shall elect one delegate and the electors of each senatorial district as then organized shall elect one delegate at a partisan election. The delegates so elected shall convene at the seat of government on the first Tuesday in October next succeeding such election or at an earlier date if provided by law.

Convention officers, rules, membership, personnel, publications.

The convention shall choose its own officers, determine the rules of its proceedings and judge the qualifications, elections and returns of its members. To fill a vacancy in the office of any delegate, the governor shall appoint a qualified resident of the same district who shall be a member of the same party as the delegate vacating the office. The convention shall have power to appoint such officers, employees and assistants as it deems necessary and to fix

their compensation; to provide for the printing and distribution of its documents, journals and proceedings; to explain and disseminate information about the proposed constitution and to complete the business of the convention in an orderly manner. Each delegate shall receive for his services compensation provided by law.

Submission of proposed constitution or amendment.

No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to and serving in the convention, with the names and vote of those voting entered in the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner and at the time provided by such convention not less than 90 days after final adjournment of the convention. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon the constitution or amendments shall take effect as provided by the convention.

APPENDIX B

Table

County	*% of total population*	*Theoretical Entitlement (% of total Population x 110 seats)*	*Actual Seats Allocated*	*Cumulative Theoretical Entitlement*	*Cumulative Actual Seats Allocated*
Wayne	34.08	37.49	37		
Oakland	8.83	9.71	10	47.20	47
Macomb	5.19	5.71	6	52.91	53
Genesee	4.78	5.26	5	58.17	58
Kent	4.64	5.10	5	63.27	63
Ingham	2.70	2.97	3	66.24	66
Saginaw	2.44	2.68	3	68.92	69
Washtenaw	2.20	2.42	2	71.34	71
Kalamazoo	2.17	2.39	2	73.73	73
Muskegon	1.92	2.11	2	75.84	75
Berrien	1.92	2.11	2	77.95	77
Calhoun	1.77	1.95	2	79.90	79
Jackson	1.69	1.86	2	81.76	81
St. Clair	1.37	1.51	2	83.27	83
Bay	1.37	1.51	2	84.78	85
Monroe	1.29	1.42	1	86.20	86
Ottawa	1.26	1.39	1	87.59	87
Lenawee	.99	1.09	1	88.68	88
Allegan	.74	.81	1	89.49	89
Marquette	.72	.79	1	90.28	90
Van Buren	.62	.68	1	90.96	91

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 962

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,
Appellants,
vs.
JAMES M. HARE, Secretary of State of State of Michigan, and
FRANK D. BEADLE, JOHN W. FITZGERALD, and PAUL C. YOUNGER, Senators of the State of Michigan, and
STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

THEODORE SACHS,
3610 Cadillac Tower,
Detroit, Michigan 48226,
Attorney for Appellants.

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APPENDIX—Maps Comparing Old and New Senate Districts.

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

1. THE SENATE

The complete absurdity of a plan of legislative representation based *literally* on area becomes manifest in the tortured efforts of appellees *Faville* and *Beadle et al.*[1] to justify its irrationality.

Apart from the platitudinous refrains, not unfamiliar to this Court, of "adequate representation", "effective representation", "representation for all the people", and of each state's "uniqueness", appellees Faville and Beadle find great difficulty agreeing with the Court below, with each other, and with themselves as to just how and why it can be constitutionally permissible for one citizen's vote to be worth more than four times another's, for minorities to perpetually control both houses of a state legislature, and for a state to literally provide for the representation of space.

For example, the majority below justified the literal area representation formula as a deliberate and permissible effort to aid a particular "impoverished" region of the state—in other words, to grant a political subsidy to those said to be suffering a *paucity* of economic interests. But appellees would justify the same plan for the same region because of the asserted *multiplicity* of those interests. Both are clearly wrong.

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[1] Hereafter, unless context indicates otherwise, "appellees" refers to appellees Faville and Beadle et al., and not appellee Hare, the Secretary of State, who, represented by the Attorney General, concurs with appellants.

As the legislative history, recounted in the margin, demonstrates,[2] there was only one objective on the part of the framers of this document, who openly abandoned all pretense of representing "interests" or "accessibility" or

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[2] When challenged to explain the specific 4-1 ratio of the "80%-20%" formula Dr. John Hannah, chairman of the legislative apportionment committee, told the convention:

"Dr. Pollock rather criticizes it because he says that the committee report doesn't factually point up how we arrived from where we started to where we finished. We started with the notion, as I have indicated before, that at least one house of the Michigan legislature was going to take into consideration *some* factor besides straight population, and the decision was finally made that that was going to be the state senate.

"Then the next question that had to be answered was: what factors are you going to give consideration to? We were importuned that we should give consideration to area for many reasons which I will not repeat and bore you with this afternoon. Points were made that if you were doing this ideally, we ought to somehow or other make certain that in the legislature all of the important economic groups of the state have representation, that the northern part of the state with its sizable resort and tourist interests should have representation, agriculture should have representation, mining should have representation, the varied manufacturing interests of the state should have representation, people living in the urban areas certainly should have representation and so forth. The question became: how are you going to do this? And we spent weeks at it. And finally the William Hanna proposal, the genesis of it—and there was never any secret about it; all of our meetings were open; many of you attended them—we came up with the decision tentatively that we ought to be honest about it and that some fraction of the senators should be assigned on the basis of *something besides population*. And the proposal that I made before the committee and that they finally improved upon was that *we say forthrightly that 8 members of the senate should be apportioned on factors other than population, and then the difference between 8 and whatever the total was to be, 31, 38 or 40, we would apportion on population.*" (Convention Record pp. 2094, 5, April 3, 1963. Emphasis supplied.)

* * * * *

"The committee, after a good deal of thought, came to the conclusion—and I am sure the committee was correct—that the best interests of this state are going to be served if one house of the legislature is apportioned on *some* basis other than straight population. The committee decided that it would be the senate that

(Continued on next page)

other values, and in fact acknowledged that the plan "discriminated against the counties with the largest population":[3] that single objective was to arbitrarily take 8 seats

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(Continued from preceding page)

would be apportioned on *some* basis other than straight population. It then gave consideration to what factors should be given consideration: obviously area was one factor. The suggestion was made that it would be appropriate to take into consideration economic interests because of the diversity of interests in some areas. And there were other suggestions. *Finally, because of the difficulty of identifying anything but area, the committee concluded that area and population were the only factors that it could recommend to this convention.*

"Then the question came as to what emphasis would be placed on area. And at this point, after a good deal of thought by all members of the committee, I think we concluded that the fairest proposition would be to come to you recommending that there be a definite number of senators allocated on area; and you will recall that this was a statement I made before. My proposal to our committee was that we be objective and fair and forthright about it; and I proposed that we divide the state into 4 geographic areas approximately equal in population [sic], but vastly different in area [sic]: the upper peninsula, the northern half of the lower peninsula, southwest Michigan, southeast Michigan and that we allocate 8 senators on an area basis, 2 to each region. And then we faced the problem of how to allocate the seats within the region. And of course we came to the conclusion that the only way that you could allocate the seats within the region would be on the basis of population. And if we were to follow that proposal, which was a personal proposal, it had the effect, in southeastern Michigan, of putting the area senators into Wayne county *because that's where the people are. And that wasn't the reason for the area senators in the first place.*

"Then Mr. William Hanna devised the formula which we presented to you before and again today, and that was the one that we come up with a factor per county, with 20 percent of the factor [sic] in each county based on area and 80 per cent of the factor [sic] in each county based on population. And that's the one before you." Convention Record, p. 2808 (April 25, 1962). (Emphasis added.)

[3] In resisting a particular variation of the "80-20" formula which it was felt would expose it to undue judicial risks, William F. Hanna, acknowledged author of the formula, told legislative apportionment committee members:

"We should be very careful not to load the Senate twice against the counties with the largest population *by first discriminating against them with the 80-20 formula* and then again discriminating against them in the application of the formula in creating Senatorial districts." (Emphasis added.) (Exhibit L, below.)

—*not 4, as asserted by appellees*—out of 38 (or "20%") as a net shift from metropolitan to rural areas, and to do so in a way thought constitutionally passable in the wake of *Baker v. Carr*. Only thus could the status quo substantially be maintained. And, constitutional infirmities aside, it was. For when all is said and done, northern Michigan, as defined by appellees and the Court below (the Upper Peninsula and the northern lower peninsula), *continues* to have just over 6 senators, with a population entitling it to 3—*exactly as it did under the 1952 apportionment plan invalidated in Scholle v. Hare*, 367 Mich. 176, No. 24, this Term, *sub nom., Beadle v. Scholle* (as vividly demonstrated by the over-lay map appended to this brief). Moreover, while Wayne County (Detroit) receives 10 seats under the new constitution, as distinguished from 7 under the old, its increase in fact is diluted in the enlarged Senate of 38 (increased 4 from the previous 34) and it still gets less than the 13 to which its population entitles it. Finally, a majority of people still lack the majority control and the degree of representation to which their numbers entitle them, artificial aggregations of arbitrarily defined "urbanized areas" to the contrary notwithstanding.

The fact of the matter is that the "80-20" formula does none of the things its apologists claim.

Clearly, if there is anything the present formula does *not* do, it is to represent "diverse interests". Even if we ignore the legislative history cited earlier, in which any pretense of representing specific and diverse "interests" was abandoned; even if we ignore the proposition that "discriminations are not to be supported by mere fanciful conjecture", *Hartford v. Harrison*, 301 U.S. 459, 462; *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209; and even if we ignore the basic precept that in a democratic

society special and favored classes of voters can not be created at the expense of others, the fact is that this plan, or any plan of literal area representation, invidiously favors certain citizens and disfavors others on a totally different basis, namely, with respect to the number of acres surrounding each. For, far from according representation to diverse interests, the literal representation of space inherently does the opposite, for in premise and design it accords representation irrespective of the existence of human habitation or activity, or its variety. Thus, an acre in downtown Detroit on which a crowded apartment or office building stands receives no less or more area (not people) representation than the acre, for example, of uninhabited forest land to the north. By the same token, the land, however valuable, upon which an auto manufacturing plant is located, is treated no differently than the farm land of equivalent size, whether of good, bad, or indifferent fertility. And the up-to-40 acre lakes, which are defined as "land" for purposes of this plan under borrowed U. S. Census Bureau definition, will also be treated as well, as will the cut-over land, swamps and state and federal forest lands of the Upper Peninsula. Indeed, a huge part of all the "area factors" which "northern Michigan" will receive under the plan will come from substantially uninhabited *public* lands—state and federal—whose "credits" will go, not to all the citizens of the state who own it, but inequitably to those who fortuitously happen to live next door. And no matter how many of these persons may hereafter move elsewhere, and no matter whether the Upper Peninsula is tomorrow "impoverished" or prosperous, this plan will in perpetuity grant continued space representation. In fact, should the arbitrarily selected "interests" of "heavy industry, farming, tourism, lumbering and mining" be wiped out in the morning, the land presently involved would still qualify for unabated

"area factors", to even more enhance the representation of declining human population left behind.

Nor does the plan square with pretentions of "effective representation" and "accessibility". For one thing, the literal representation of space or area—that is, the "measure of surface extent" as dictionary-defined—clearly is irrelevant to communication or "accessibility"; for if in the real space and electronic age of 1964 "accessibility" is a function of distance at all—which we dispute[4]—it is at most of *linear* distance on modern superhighways with modern automobiles. But "accessibility" is not basically a function even of linear distance, for the proffered image of the circuit riding legislator endlessly huddling with each constituent is preposterous. If direct communication should ever occur between them, it will as easily be effected in rural areas as urban by the same 5-cent stamp or instantaneous phone call. Moreover, in terms of mass media of communication, namely, press, radio and TV, the competition for space and time for news coverage and the cost for political advertising will be far less, with the coverage and efficiency far greater, in "outstate" than in metropolitan areas.

Nor will the absurdities of the present plan vanish in the face of the purported "deliberate" choice of the people in adopting them. As noted before, (1) constitutionally, the

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[4] So did the constitutional convention. Delegate Cushman proposed an amendment which—constitutional issues aside—would have squarely assuaged professed majority-delegate concerns about sparsity-accessibility problems in large area districts. She proposed that 39 districts be formed of counties or groups of counties, each having approximately 1/39th the state's population, *with no district to exceed 10% of the state's land area.* (Convention Record, p. 2173, April 5, 1962.) On recommendation of the chairman of the legislative apportionment committee, the proposal was defeated. (Convention Record p. 2174, April 5, 1962.)

argument is irrelevant; (2) the measure of adoption was infinitesimal, less than one-half of one percent; (3) the apportionment provisions were not, in fact, voted upon at all, but were merely adopted as part of an entire constitution; (4) the complexity of these provisions was great and it is obvious that the voters could not have "deliberately" evaluated their minutiae; (5) the proposal's general import was misrepresented to the public, which was repeatedly told that the plan established a formula of uniform representation for every section of the state (and certainly not a favored program for northern Michigan); and (6) the leading proponents of the plan, including the present Governor, told voters to approve the constitution *despite* these provisions, which presented, they said, a legal question for ultimate judicial, not political, determination.

At least the 2-1 court below *professed* to concede that population representation was the starting constitutional standard and that departures from that standard—i.e., districts of equal population as nearly as practicable—must be rationally based and be reasonable in degree. Judge Kaess professedly adopted the formulation of Solicitor General Cox, namely, that a violation of the Fourteenth Amendment in the legislative apportionment context will *at least* occur in any one of three instances: (1) when an apportionment creates substantial inequalities in representation without rhyme or reason, i.e., is without *any* discernible basis; (2) when discrimination results from criteria, however intelligible, which are irrational, invidious or irrelevant—that is, are *qualitatively* defective; and (3) when an apportionment plan subordinates the principle of popular representation to an excessive degree—in other words, is *quantitatively* excessive.

Appellees' startling contrary premise—that substantial adherence to population in one house excuses *any* gross departure in the other "since any apportionment not based strictly on population will produce variations in the number of persons represented by a legislator"—must surely underlie their pleas for affirmance, for no rational or consistent justifications—pretentious slogans aside—are offered for the challenged plan.

Clearly no amount of after-the-fact rationalization can turn this sow's ear into a silk purse; it is an incredible and outrageous affront to democracy.

2. THE HOUSE OF REPRESENTATIVES

Appellees' extravagant efforts to prove the House provisions to be strictly population based are similarly without merit. The simple answer to their contention is that the very map and tables relied upon by them result from a misapplication of the House formula. Specifically, appellees suggest that that clause which gives to each county or group of counties a seat upon attaining 7/10ths of 1% of the state's population is permissive rather than mandatory. But the language itself is to the contrary; the official message of the Constitutional Convention is to the contrary; the legislative history is to the contrary; and the historical antecedents of this clause, intended to *guarantee* under-populated counties minimal representation, are to the contrary. The necessary and unfortunately correct application of the "modified moiety" (.7%) clause is that from it alone there is a predictable net 4-seat shift from populous to less populous areas,[5] which is coupled with the

[5] Judge Kaess virtually concedes as much. See Opinion, Jurisdictional Statement, p. 7a.

2-1 population disparities and other departures from a population standard, of which Judge Roth wrote in dissent below.

Neither house is population-based.

3. SUMMARY

Appellees' briefs only confirm what our Jurisdictional Statement has heretofore set forth—that there will be Senate district disparities in population exceeding 4-1 and House variations of 2-1; that there will be a net 8-out-of-38 seat shift (20%) between more populous and less populous areas in the Senate and lesser departures in the House; that there will be perpetual minority control in both chambers; and that the disparities will constantly get worse. Most important, all of the disparities result arbitrarily, unnecessarily and without constitutional justification from the acknowledged invidious purpose of favoring ("weighting") some citizens over others. Unless the decision below is reversed, there will have occurred for the first time in the history of the United States a deliberate plan—and national blue-print—of favoring some citizens at the expense of others, through the device of the literal representation of space. Surely, no such result can be countenanced under the Fourteenth Amendment.

We pray review and reversal.

Respectfully submitted,

THEODORE SACHS,
Attorney for Appellants,
3610 Cadillac Tower,
Detroit, Michigan 48226.

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1952 CONSTITUTION SENATE DISTRICTS [34]
[EXISTING DISTRICTS]



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[ACCORDING TO APPELLEES' CONCEPTION]